



# **The Barrie Guide to the English Legal System and Legal Method**

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6. *Fisher v. Bell* [1960] 3 WLR 919
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8. *Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.* [1964] AC 465
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# INTRODUCTION

This manual is designed to familiarise you with some basic ideas about the system of law in England and Wales. It is largely English law that you will be learning and applying in this course. The law of any country is much more than a “set of rules”. The rules are what we perceive on the surface, but creating and underpinning them is a “legal culture” or way of thinking. The way the rules work can only be understood by considering the context in which they are generated and applied.

If you have not studied or worked with English Law before, you will find it invaluable to gain a basic knowledge of legal structure, legal language, legal research and legal analysis, before looking at the substantive law which forms the main body of this course.

Throughout this text you will find formative exercises, some of which you will attempt in the tutorials and as homework.

Good luck with the course. We hope you find it enjoyable, interesting and useful.

Best wishes,

A handwritten signature in black ink that reads "Barrie Goldstone". The script is cursive and fluid, with the first name "Barrie" and last name "Goldstone" clearly legible.

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# FURTHER READING

## General Reading

There are many excellent text-books which give a clear account of the English Legal System. We would recommend the latest editions of any of the following:

*The English Legal System* (Gillespie, OUP)

*The English Legal System* (Slapper and Kelly, Routledge)

*Smith and Keenan's English Law* (Keenan, Pearson)

(Especially part one. This book also contains a useful summary of many areas of substantive law.)

There are also several useful guides to studying the law, including:

*Glanville Williams: Learning the Law* (Smith, Sweet and Maxwell)

You may also wish to have a law dictionary to clarify the many strange words and phrases beloved of lawyers. There are many fine ones on the market, including:

*Osborn's Concise Law Dictionary* (Bone, Sweet and Maxwell)

## Cases

In addition to reading text-books, you must get used to reading the judgments in decided cases. In the Common Law system of England and Wales, judgments do not just illustrate an application of the law: they often create it.

*n.b. The word 'judgment' is spelt without the middle 'e' when it means court judgment. You must NEVER spell it 'judgement' in this context... EVER!*

## Statutes and Treaties

You must also get used to reading statutes (Acts of Parliament) and treaties, as they are the primary source of English Law. Even areas of law that are largely based on the Common Law (such as the Law of Contract) involve the intervention of several important statutes.

*n.b. The word 'Act' is always spelt with a capital 'A' when it refers to an Act of Parliament, even if it appears in the middle of a sentence. Similarly, the word 'Bill' is always spelt with a capital 'B' when it refers to a Bill of Parliament (i.e. a statute before it has received the Royal Assent).*

## Authorial Note

This manual has been compiled and written by Barrie Goldstone, with acknowledged reference to - and inclusion of - primary and secondary sources.

Sections 29-30 are based on a text by Silas Beckwith  
Parts 6 and 7 are based on a text by Michael Meehan

# PART ONE: LEGAL LANGUAGE

## 1 THE CATEGORIES OF LAW

### General Categories

- 1.1 There are numerous ways of categorising English Law, including:
- Commercial Law (such as Contract, Company Law and Property Law);
  - The Law of Tort (such as Negligence, Trespass, Defamation and Private Nuisance);
  - Family Law (such as Divorce and Adoption Law);
  - Chancery Law (such as Testamentary Law, Trusts, Patents and Settlements).
- 1.2 Although such branches of law are taught – and often practised – as discreet areas of law, they all constantly overlap and cannot be understood or practised in isolation.

### Criminal and Civil Law

- 1.3 The key division in English Law is between CRIMINAL LAW and CIVIL LAW. Depending on whether a case falls within one branch or the other will determine a host of essential matters, including:
- The procedure to be followed in pursuing a case
  - The courts which may be asked to decide the case
  - The personnel involved in the case
  - The required standard of proof
  - The possible outcomes of the case
  - The terminology and legal language appropriate to the case

### Private Law and Public Law

- 1.4 Another key division that is often made is between PRIVATE LAW and PUBLIC LAW. As the names suggest, PRIVATE LAW concerns matters between private individuals, whereas PUBLIC LAW concerns matters of state.
- 1.5 Private Law covers the following:
- The Law of Contract: consensual obligations arising by way of an agreement
  - The Law of Tort: non-consensual obligations arising as a matter of general law
  - The Law of Property: real (land) personal and intellectual
  - The Law of Equity and Trusts: including wills and succession
  - Family Law: including marriage, divorce, adoption and custody
- 1.6 Public Law covers the following:
- Administrative Law: the functions and control of governmental powers<sup>1</sup>
  - Constitutional Law: the relationship of the State, the government and the citizen<sup>2</sup>
  - Criminal Law

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<sup>1</sup> Such as Judicial Review before the Administrative Court.

<sup>2</sup> Such as Parliamentary sovereignty; the Rule of Law; the separation of powers; and the structure of government.



## 2 THE LANGUAGE OF THE LAW

### Criminal Law and Civil Law Terminology

- 2.1 As well as using different courts, criminal law and civil law cases have different procedural rules and, to some extent, use different terminology. Some of the differences between civil and criminal cases are as follows:

#### **CRIMINAL CASES**

##### **Crimes are also called 'offences'**

Prosecutions are brought by the State in the name of the Crown, the Crown Prosecution Service or the Director of Public Prosecutions.

##### **The defendant in a criminal case is sometimes called 'the accused'**

The victim of a crime may not decide that the prosecution should end as it is brought in the public interest (though a refusal to 'press charges' may have that effect).

##### **The Crown, through the Attorney-General, may end a prosecution.**

Persons who commit a crime are 'guilty'.

##### **Sanctions are intended to punish**

Those found guilty of a crime get a criminal record.

##### **The prosecution must prove the case 'beyond all reasonable doubt'.**

#### **CIVIL CASES**

##### **Civil wrongs are not called 'offences'**

Suits are brought by private individuals, known as claimants (known pre-1999 as plaintiffs).

Only the wronged person may sue.

##### **The defendant in a civil case is always called 'the defendant'**

The claimant may discontinue the case at any time.

##### **The Crown may not intervene in a civil suit.**

Persons who commit a civil wrong are 'liable'.

##### **Remedies are intended to compensate**

Those found liable for a civil wrong do not have this recorded against them.

##### **The claimant must prove the case 'on the balance of probabilities'.**

### Legal Latin

- 2.2 Since the Woolf Reforms of 1999 there has been less Latin used by lawyers, but many phrases still persist in common usage. These include:

*inter alia* = amongst other things

*prima facie* = at first sight

*a fortiori* = even stronger (e.g. "There is an *a fortiori* case for deciding in my client's favour.")

*actus reus* = the action involved in committing a crime

*mens rea* = the mental element of a crime (e.g. dishonesty or intent)

*per curiam* = "By the court". It indicates a decision which has been reached by the whole court, as opposed to just the majority of the judges.

*per incuriam* = "By carelessness." It indicates that a decision was wrongly decided as a matter of law and so may be disregarded as a precedent.

*Cur ad vult* = *Curia advisari vult* meaning 'the court wishes to be advised'. It appears in law reports to indicate that the court went away to consider the matter and reserved its judgment for another day.

### 3 THE OVERLAP OF CRIMINAL AND CIVIL LAW

3.1 Many actions which give rise to criminal proceedings may also form the basis of a civil action for the victim of the crime, and civil cases are generally easier to prove for two reasons:

- i) The required standard of proof is much lower in civil cases;<sup>3</sup>
- ii) Most civil actions do not require the claimant to prove a '*mens rea*' as in crime.

3.2 Although the victim of a proven crime may be granted compensation by the court, often the victim will have to bring a private action to recover substantial damages.

#### **CRIMINAL OFFENCES**

**THEFT – Dishonestly taking property, intending permanently to deprive the owner of it.**

ASSAULT – Hitting someone

**THREATENING BEHAVIOUR**  
Putting someone in fear of being hit

MANSLAUGHTER  
Causing death by negligence

**KIDNAP**  
Holding someone prisoner without legal authority

**FRAUD**

**CRIMINAL DAMAGE**  
Deliberately or recklessly damaging someone else's property

#### **CIVIL ACTIONS**

**CONVERSION – Having possession of someone else's property and refusing to return it**

BATTERY – Unlawfully touching someone

**ASSAULT**  
Putting someone in fear of an immediate battery

NEGLIGENCE/ OCCUPIERS' LIABILITY  
Causing a foreseeable accident without taking reasonable care

**FALSE IMPRISONMENT**  
Preventing someone from going where they are lawfully allowed to be

**DECEIT/ MISREPRESENTATION**

**TRESPASS TO GOODS**  
Deliberately interfering with someone else's personal property

#### **EXERCISE ONE: The Overlap of Criminal and Civil Law**

Consider the **CRIMINAL** and **CIVIL** liabilities which appear in this scenario.

Barrie was very jealous of Anil, who had just obtained his LLB. He went to the public library where he knew Anil was studying and started to shout at him: "You're a cheat. Everyone knows it!" The librarian told Barrie to be quiet. Anil ignored Barrie, so Barrie lit a cigarette and dropped the ash on the page of the library book Anil was reading. He then stubbed the cigarette out on the book, burning a hole in the page. Still Anil did nothing, so Barrie started to take books from the shelves and hurl them around, causing distress to the other library users who feared they would be hit by them. Indeed, several of them were injured by the flying books.

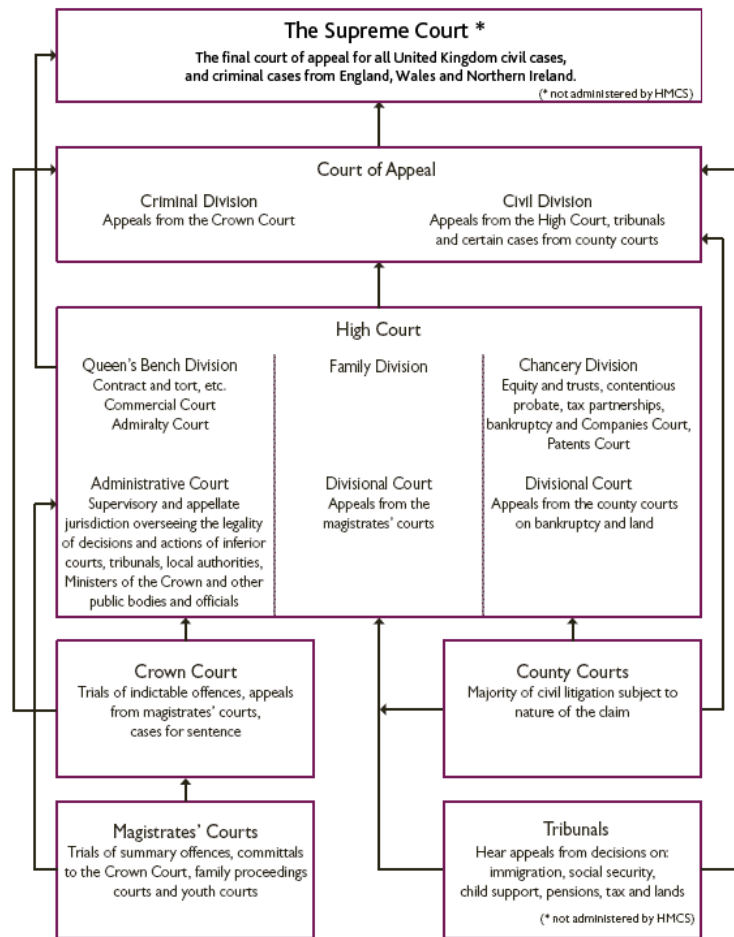
Barrie then went into a room marked "PRIVATE" where he found some heavy metal bookends. He went over to Anil and smashed them onto his head, causing Anil to die. Barrie decided to keep the bookends as a souvenir of a job well done.

He started to leave the library when he realised that an angry mob was chasing after him. He ran outside and jammed the library doors with the bookends so that no-one could get out. He then jumped into a stranger's car and drove away. He sped through a red light, knocking over several pedestrians on his way.

He then got a job by pretending to be Anil and using a copy of Anil's LLB certificate.

<sup>3</sup> The civil law standard of proof is 'on the balance of probabilities' or 'more likely than not'. The criminal law standard of proof is 'beyond all reasonable doubt'.

## 4 THE HIERARCHY OF THE COURTS



# PART TWO: THE SOURCES OF ENGLISH LAW

## 5 STATUTE LAW: Introduction

### The Pre-eminence of Statute Law

- 5.1 Statutes (otherwise known as Acts of Parliament) and statutory instruments (regulations made under the authority of statutes) are the major sources of new law. They are collectively known as legislation.
- 5.2 The supreme legislative body in England is '*The Queen in Parliament*', whose promulgations, issued as Acts of Parliament, overrule any contrary legislation (from whatever source) and, in general, cannot be challenged provided that the recognised procedure has been followed.
- 5.3 Furthermore, it is not lawful for the government to prorogue Parliament in order to prevent it from debating and voting on legislation which might be contrary to the government's own agenda.

#### ***R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent)*** **[2019] UKSC 41**

*"Let us remind ourselves of the foundations of our constitution. We live in a representative democracy. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons - and indeed to the House of Lords - for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts."* per Baroness Hale, para 55

- 5.4 However, there are some exceptions to the '*Supremacy of Parliament*'.
  - i) Statutes may not bind future Parliaments. This is known as the '*implied repeal rule*' and is upheld by UK courts.
  - ii) Under the European Communities Act 1972, EU Law used to override domestic law where the latter was inconsistent with it. However, the Act was repealed by the European Union (Withdrawal) Act 2018, when the UK left the European Union.
  - iii) The Human Rights Act 1998 binds Parliament to respect the rights and freedoms of English people guaranteed under the European Convention on Human Rights. Under s.19 of the Act, Government Ministers, when introducing legislation, must demonstrate that the Bill is compatible with Convention rights. In theory, Parliament could escape these responsibilities by repealing or amending the Human Rights Act 1998. Parliament is also entitled to make incompatible laws (as it cannot be bound by any Act) as long as it makes its intention to do so clear in the legislation itself.

## **6 STATUTE LAW: The Legislative Process**

### **Introduction**

- 6.1 In order to become an Act of Parliament (A STATUTE), proposed legislation must pass through a number of stages in both the HOUSE OF COMMONS and the HOUSE OF LORDS (having started in either), and must then receive the ROYAL ASSENT.

### **The House of Commons**

- 6.2 The House of Commons comprises 650 Members of Parliament who are elected by the public at a General Election (or at a by-election where a Member has died etc.) The United Kingdom is divided into constituencies, each of which elect one Member on a straight majority basis. Whichever political party gets the most members is invited to form the Government, and the head of that party becomes the Prime Minister. Where no party gets an overall majority, it may be necessary for two or more parties to form a coalition government which does not really represent the majority will at all!
- 6.3 Since 1999, Scotland has had its own parliament, where members are elected on a proportional representation basis. The Scottish Parliament has limited powers to make local laws, and most general legislation pertaining to Scotland still comes from the Westminster Parliament. Wales also has a mini-parliament known as the Welsh National Assembly, with even fewer powers than its Scottish counterpart.

### **The House of Lords**

- 6.4 Traditionally, the House of Lords was made up of Hereditary Peers, who gained their position by descent (759 in 1999), and Life Peers, who were appointed for their good deeds or, more commonly, as a political favour (477 in 1999.) Since the Parliament Acts of 1911 and 1949, the power of the Lords has only been to delay the passing of a Bill for up to a year (only a month for financial measures). If a Bill is thus defeated in the Lords, it can be reintroduced by the Commons without the need for the Lords' consent.
- 6.5 The House of Lords Act 1999 abolished the right of Hereditary Peers to sit in the House of Lords, except for allowing 92 of them to continue until some better arrangement had been worked out. (The 92 were elected by other Hereditary Peers under a formula to ensure that they represented the same political spectrum as the 759 they were replacing.) An Appointments Commission was established in 2000 to recommend non-party political individuals who should be appointed to the Lords on merit. Members of the public were invited to nominate others (or themselves).
- 6.6 This rather haphazard piece of legislation was much criticised and in its 2001 manifesto, the Labour Party stated its intention to complete the reform of the House of Lords by removing the remaining Hereditary Peers and by making the House of Lords more representative and democratic, whilst maintaining the primacy of the House of Commons. However, the attempts to effect such reform have so far proved disastrous.
- 6.7 A White Paper published in November 2001 proposed that the new House of Lords should include 120 independent members appointed by the Appointments Commission; 120 directly elected members; 16 bishops; 12 Law Lords; and 332 nominated political members. This received such a hostile response from Parliament (most of whom wanted at least 50% of the Lords to be elected) that it was abandoned, and a Joint Committee on House of Lords Reform was set up in May 2002.

- 6.8 The Joint Committee published a report in December 2002 suggesting seven options for the composition of the second chamber, including that they should be fully elected; fully appointed; 50:50; or 80:20 either way. In February 2003, Parliament voted on these proposals and rejected all of them! The government's response, given in July 2003, was that there was no consensus about introducing any elected element in the House of Lords, effectively reversing the manifesto commitment to a democratic upper house.
- 6.9 In September 2003, The Department for Constitutional Affairs published a consultation document suggesting that all the Hereditary Peers be removed and that the Appointments Commission be given a statutory basis: it is currently non-statutory and non-departmental. Then, apart from five direct Ministerial appointments made by the Prime Minister, all members of the House of Lords (about 600) should be appointed by the Appointments Commission. As a similar proposal had already been soundly rejected by Parliament, and as it eliminates all idea of democratic elections, the proposal was treated with horror and derision.
- 6.10 During thirteen years in power, the Labour government did nothing to keep its promise to abolish the powers of the remaining unelected peers. Indeed, Gordon Brown (himself unelected as Prime Minister) gave the formally disgraced Minister, Peter Mandelson, a peerage and appointed him as his *de facto* unelected Deputy!
- 6.11 An important change however was the creation of the Supreme Court under the provisions of the Constitutional Reform Act 2005. In effect this was to promote the effectiveness of the constitutional principle of the separation of powers between the legislature, executive and the judiciary in the UK. The new Court now sits opposite the Houses of Parliament. Previous to the entry into force of the Act the top UK court, previously known as the 'House of Lords', was, in reality, a committee of the House of Lords. It was made up of the Law Lords themselves who were, of course, Members of the House.
- 6.12 Following the disastrous efforts of Nick Clegg, the then Deputy Prime Minister, to introduce a Bill to reform the House of Lords, it is clear that democratic reform is not high on the agenda of the majority of Members of Parliament in either of the main parties.
- 6.13 There are currently 794 active members of the House of Lords: 676 Life Peers; 92 Hereditary Peers; and 26 Bishops.

## **The Royal Assent**

- 6.14 The Royal Assent – the consent of the monarch to the creation of an Act of Parliament – is now a mere formality, and is achieved by a formal reading out of the short title of the Act in both Houses of Parliament.<sup>4</sup>

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<sup>4</sup> In 1708, the last Stuart monarch, Queen Anne, on the advice of her Ministers, withheld her Assent from a Bill for the Settling of the Militia in Scotland, but no monarch has since refused Assent, and it would cause something of a constitutional crisis if they did.

## Creating a Statute

- 6.15 Most legislation is generated by the government, though individual Members of Parliament may also propose legislation in the form of a PRIVATE MEMBER'S BILL. As such Bills must go through an elaborate ballot procedure to be considered, they are rarely successful
- 6.16 The normal procedure is as follows:
1. The Legislation Committee decide on the legislative programme for the parliamentary session, which is announced in the Queen's Speech, delivered by the Queen herself at the State Opening of Parliament, usually in November: (Remember the Gunpowder Plot of 1605!)
  2. Green Papers are prepared. These are consultation documents issued by the government which set out proposals and invite comments from interested parties.
  3. After consideration of any response, the government publishes firm proposals in a White Paper. This is then published in the proposed format for the final statute. This is known as a Bill.
  4. The Bill then goes through five distinct procedures:-
    - i) *First Reading*: Formal announcement of the title of the Bill and the Member introducing it. The Bill is then printed.
    - ii) *Second Reading*: Extensive discussion of general principles. If the majority are in favour, the Bill passes on to the committee stage.
    - iii) *Committee Stage*: Close examination of the Bill, debates and amendments. The Standing Committee is about 20 people representing the main political parties, but very important Bills may involve the whole House.
    - iv) *Report Stage*: The Bill, as amended, is reported to the House by the Standing Committee for discussion and further amendments.
    - v) *Third Reading*: Final debate and vote. If the Bill is passed, it is sent to the other House. If it is approved again, it is sent for THE ROYAL ASSENT.
- 6.17 Where the second House make amendments, the Bill must go back to the first for new approval, and so on. This may happen repeatedly, but if the Bill is not finally approved within the Parliamentary session, it will be lost.<sup>5</sup>

## Delegated Legislation

- 6.18 Many statutes authorise Ministers and other officials to make regulations with statutory effect without going through the legislative process. The most common are STATUTORY INSTRUMENTS (about 2500 published each year, compared with about 50 Acts of Parliament). These must be laid before Parliament for 40 days to enable either House to object. Under the Emergency Powers Act 1920, however, when a state of emergency is proclaimed, ministers may make ORDERS IN COUNCIL which are not subject to delay.

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<sup>5</sup> The power of the House of Lords to delay a House of Commons Money Bill is limited to one month by the Parliament Acts 1911 and 1949.

- 6.19 Parliament also often authorises local authorities to make BYE-LAWS over their respective areas. Anyone purporting to make delegated legislation which is not within the ambit of their powers under the Act is said to be acting *ultra-vires* and their legislation may be held to be void by judicial review.

## 7 THE COMMON LAW: Introduction

### Historical Context

- 7.1 The Norman Kings, wishing to unify the legal system, set up the system of the travelling courts called the 'assizes' (abandoned only in 1971). This involved appointing judges to tour the country, holding court sittings (the assizes) to hear and settle key local disputes according to such customs as appeared reasonable, replacing bad ones with customs from other areas or with new rules. The judges (Royal Commissioners) met to try cases in the Royal Courts at Westminster, where local cases could be discussed and common principles agreed. Thus a Common Law (*ius communis*) was gradually developed.
- 7.2 The process of establishing a national system was considered to be achieved by the death of Henry II in 1189, which is known as the "limit of legal memory". The period prior to this is known as "time immemorial"<sup>6</sup>.

### Present Context

- 7.3 The Common Law is still a major source of law (e.g. it is the basis of the law of murder and contract), but it is not always easy to discover exactly what the law is. It depends firstly on finding a relevant previous case to follow, and then on deciding whether or not that case actually creates a new point of law which MUST be followed – a so-called "binding precedent" – or merely expresses an opinion about the law which may or may not be followed – a "persuasive precedent" or a "non-binding precedent".
- 7.4 This doctrine of precedent – known as '*stare decisis*' (the decision must stand) – is said to promote certainty in English Law, but although some judges stick rigidly to the rules (sometimes called "black letter lawyers"), others have taken liberties with the doctrine to develop the law according to their own concepts of justice, policy and pragmatism (such as Lord Denning).
- 7.5 The constitutional doctrine of the 'separation of powers'<sup>7</sup> implies that English judges are there not to "make" law, but to decide the cases in front of them by "applying" the law. In practice, however, because finding the *ratio* of a case involves a process of interpretation, judges do "make" law by extending existing principles to cover new factual situations, and by restricting existing principles so as to exclude new situations. In doing this, they are openly influenced by considerations of public policy, a theoretical guide which may change not just from era to era, but from case to case.
- 7.6 There are three matters to be considered in discovering what the common law provides:
- i) Where to find the reports of previous cases;
  - ii) How to find the law in the cases;
  - iii) How the cases rank against each other.

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<sup>6</sup> This term usually means 'as long as anyone can remember' nowadays.

<sup>7</sup> The traditional separation of powers in an effective state is between the legislature, the executive and the judiciary.



## 8 THE COMMON LAW

### The Operation of Judicial Precedent I: The Law Reports

- 8.1 From 1272-1535 Year Books were compiled as records of the current law, though these dealt largely with procedure rather than substantive law and seem to have been written mainly by Bar students inbetween dinners as part of their somewhat haphazard training. From 1535-1865 the Year Books were replaced by private sets of reports published under the name of the law reporter. The standard varied greatly, from being erudite and insightful to being entirely unreliable! These are now compiled in the 156 volumes of 'The English Reports' which you can access through Lexis Library.
- 8.2 In 1865 the Incorporated Council of Law Reporting (ICLR) was established by the four Inns of Court and the Law Society to publish the key decisions of the superior courts under professional control. These have become the principal source of the Common Law and are published as 'The Law Reports', with different volumes according to which court heard the case. Thus cases from the Supreme Court/House of Lords/Privy Council may be found in 'The Appeal Cases', whereas cases from the Court of Appeal and High Court are reported according to which division of the High Court heard the original case (e.g. QB for the Queen's Bench Division).

These reports include a summary of the case written by a court reporter (the 'headnote'); a summary of the barristers' arguments; and the full text of all the judgments, as confirmed by the presiding judges. They are now known as 'the official law reports'.

- 8.3 As these can take months to prepare, the ICLR also brings out a less definitive weekly version called 'The Weekly Law Reports'. The WLR often contains cases which never get reported in the Law Reports, as the editors reserve the latter for cases of special importance (in their view). Thus the WLR, although less respected, is often cited as the only available source of a judgment.
- 8.4 It was not long before other independent publishers began to produce law reports in the style of the ICLR, though they did not have the rights to publish the arguments of the barristers or to have the transcripts approved by the judges. Principal amongst these are the All England Law Reports (All ER) which are widely used by both jurists and academics (and which are now approved by the judges).

Several other independent companies publish reports, often specialising in cases in a particular practice area. For example the Lloyd's Law Reports (now just called the Lloyd's Reports) deal particularly with cases involving shipping and insurance. These may be accessed online through iLaw.

- 8.5 Other specialist law reports include:

- Simon's Tax Cases (STC)—headnotes are sent to the judges before publication
- Law Reports of the Commonwealth (LRC)
- the Industrial Relations Law Reports (IRLR)
- Butterworths Company Law Cases (BCLC)—headnotes are sent to the judges before publication
- Butterworths' Human Rights Cases (BHRC)
- All England European Reports (All ER (EC))
- All England Commercial Cases (All ER Comm)—headnotes are sent to the judges before publication
- Local Government Reports (LGR)
- Butterworths Medico-Legal Reports (BMLR)
- Family Court Reports (FCR)—headnotes are sent to the judges before publication

- Construction Law Reports (Con LR)
- International Tax Law Reports
- Intellectual Property and Technology Reports (IP&T)—headnotes are sent to the judges before publication

- 8.6 In most general reports, the cases are simply listed chronologically, whatever the subject, which makes it difficult to find the cases particularly relevant to you. Another problem with this system is that it depends to some extent on which cases the publishers consider to be important enough to report. It is possible to find that a case reported in full in one publication will not even be mentioned in another!
- 8.7 The whole system of law reporting took on a new dimension with the advent of legal databases, which have greatly facilitated (and paraoxically complicated!) legal research. Databases such as LEXIS and WESTLAW contain virtually every decided case and all serious primary source legal research is now done online.

## Writing and saying the names of cases

- 8.8 When writing the names of cases, the letter 'v' is usually placed between the names of the parties. Although this stands for 'versus', it is wrong actually to say 'versus' or, even worse, 'vee'.
- 8.9 If the case is a civil one (e.g. contract or tort) the 'v' should be pronounced (but not normally written) 'and'. Thus the famous case of *Donoghue v. Stevenson* should be pronounced "Donoghue and Stevenson".
- 8.10 If the case is a criminal one, the 'v' should usually be pronounced (but not normally written) 'against'. Furthermore, the 'R' (which stands for Rex or Regina) is usually pronounced "The Crown". Thus the criminal case of *R. v. Barrie* should be pronounced "The Crown against Barrie".<sup>8</sup>
- 8.11 If a case is one where the actions of a public authority are being challenged by Judicial Review, the cases are brought in the name of the Crown on behalf of the member of the public who has been affected. These cases used to be named in the following way: *R. v. Merton Borough Council, ex parte Barrie*. Nowadays, they are usually abbreviated to *R (Barrie) v. Merton Borough Council*.
- 8.12 Where a case concerns a dispute about an estate or a trust (usually to do with a contested will) it will be called something like: *Re: Barrie's Will Trust*, or just *Re: Barrie*
- 8.13 Where a case concerns a ship (as with many disputes over international trade contracts), then it is conventional to call the case simply by the name of the ship involved. When the full name of such a case is given, the 'shorthand' name of the ship is usually written in parenthesis after the names of the parties.

For example, the case of *Transfield Shipping Inc v. Mercator Shipping Inc (The Achilles)* [2009] 1 AC 61 (HL), is usually just known as '*The Achilles*'.

- 8.14 The names of the parties in a case should usually be underlined or written in italics. The 'v' should not be underlined, but this custom is not always observed. OSCOLA referencing has different rules relating to cases cited in a bibliography.

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<sup>8</sup> In prosecutions brought in the name of individuals – such as *Fisher v. Bell* – the v is pronounced 'and'.

## Case Citations

8.15 The names of all reported cases are followed by a string of letters and numbers to indicate where they can be found (if at all) in the published law reports. This is called the citation. The most common citations are:

- AC = The Law Reports, Appeal Cases (covering the Supreme Court, House of Lords and Privy Council)
- QB/KB – The Law Reports, Queen’s Bench (or King’s Bench) Division (High Court and Court of Appeal)
- Ch. = The Law Reports, Chancery Division (High Court and Court of Appeal)
- Fam = The Law Reports, Family Division (High Court and Court of Appeal)
- WLR = Weekly Law Reports
- All ER = All England Law Reports
- Lloyd’s Rep = Lloyd’s Reports (formerly called Lloyd’s Law Reports)

8.16 To facilitate internet research, since January 2001 all judgments from all divisions of the High Court (and the higher courts) have been given unique ‘neutral citations’ which have no direct relation to printed law reports. These consist of the year of the case, an abbreviation of the name of the court where it was decided, and the number of the case for that year. e.g. 2020 UKSC 2 would indicate the 2<sup>nd</sup> case decided by the Supreme Court in 2020. The system has been rolled out to cover virtually all court decisions. Even if they have not been ‘reported’ the official transcripts of most cases can now be found on the internet by typing in the neutral citation.

8.17 The most common neutral citations used are:

- EWCA Civ - Court of Appeal Civil Division
- EWCA Crim - Court of Appeal Criminal Division
- EWHC (Admin) - High Court (Administrative Court)
- EWHC (Ch) - High Court (Chancery Division)
- EWHC (QB) - High Court (Queen's Bench Division)
- EWHC (Comm) - High Court (Commercial Court)
- EWHC (Admlty) - High Court (Admiralty)
- EWHC (Fam) - High Court (Family Division)
- EWHC (Pat) - High Court (Patents Court)
- EWHC (TCC) - High Court (Technology & Construction Court)
- UKHL - House of Lords
- UKSC – Supreme Court
- UKPC - Privy Council

## Hierarchy of Law Reports

- 8.18 There are strict rules about which of the various available reports should be used in court: these rules should also be applied to legal writing.
- 8.19 There have been various practice directions issued relating to the hierarchy of the law reports. The most recent of these was handed down by the Lord Chief Justice on 23 March 2012. This repealed and varied previous practice directions and statements, although it also re-stated much of the previous practice.
- 8.20 The Practice Direction 2012 provides as follows<sup>9</sup>:

### **Citation of Authority**

5. When authority is cited, whether in written or oral submissions, the following practice should be followed.
6. Where a judgment is reported in the Official Law Reports (A.C., Q.B., Ch., Fam.) published by the Incorporated Council of Law Reporting for England and Wales, that report must be cited. These are the most authoritative reports; they contain a summary of the argument. Other series of reports and official transcripts of judgment may only be used when a case is not reported in the Official Law Reports.
7. If a judgment is not (or not yet) reported in the Official Law Reports but it is reported in the Weekly Law Reports (W.L.R.) or the All England Law Reports (All ER) that report should be cited. If the case is reported in both the W.L.R. and the All ER either report may properly be cited.
8. If a judgment is not reported in the Official Law Reports, the W.L.R, or the All ER, but it is reported in any of the authoritative specialist series of reports which contain a headnote and are made by individuals holding a Senior Courts qualification (for the purposes of section 115 of the Courts and Legal Services Act 1990), the specialist report should be cited.
9. Where a judgment is not reported in any of the reports referred to in paragraphs [6] to [8] above, but is reported in other reports, they may be cited.
10. Where a judgment has not been reported, reference may be made to the official transcript if that is available, not the handed-down text of the judgment, as this may have been subject to late revision after the text was handed down. Official transcripts may be obtained from, for instance, BAILLI (<http://www.bailii.org/>). An unreported case should not usually be cited unless it contains a relevant statement of legal principle not found in reported authority.

<sup>9</sup> <<https://www.judiciary.uk/publications/practice-direction-citation-of-authorities-2012/>>.

## 9 THE COMMON LAW

### The Operation of Judicial Precedent II: Ratio Decidendi and Obiter Dicta

- 9.1 Having found a relevant decision, the next problem is to work out the point of law (if any) for which it stands. The bulk of any reported case is the judge or judges' speech or speeches, in which he, she or they will usually analyse previous decisions and reach some conclusion about the facts of the particular case in point. It is not everything that a judge says that becomes part of the "binding precedent" which other courts must follow. It is only the *actual reason for deciding that particular case*. This is known as the **RATIO DECIDENDI** which means 'the reason for deciding'.
- 9.2 A distinction is sometimes made between **DESCRIPTIVE RATIO** and **PRESCRIPTIVE RATIO**. The 'descriptive ratio' refers to the way in which a judge has reached his decision based on the particular facts before him. The 'prescriptive ratio' refers to the principle of law that derives from the case. It is only the 'prescriptive ratio' – the abstracted legal principle – which is binding, though the 'descriptive ratio' might well prove a useful guide as to how the law should be applied to similar facts.
- 9.3 To discover which part of a judgment is the *ratio* can be quite perplexing, and several appeal cases have rested on the debate about what was actually laid down in a previous case. One way to start is to ask: "What was actually decided in this case?" To determine this, you need to know exactly what the court was *asked* to decide (as opposed to any speculative comments made).
- 9.4 If any parts of the judgments do not relate to what was actually the issue in the case itself, then those parts cannot be *ratio*, but will only be *obiter dicta* (see below). e.g. In the famous case of ***Hedley Byrne v. Heller and Partners* [1964] AC 456** the House of Lords was asked to rule on whether a bank was liable for giving negligent financial advice to one of its clients. The court held that the bank was not liable because it had attached a valid exemption clause to its advice, but also commented that the bank would have been liable otherwise, as it owed the client a duty of care in negligence.

The *ratio* of the case (i.e. the reason for deciding that the bank was NOT liable) was only to do with the effect of the exemption clause. The comments about the *potential* liability were not part of the *ratio* because they were not necessary for the court to make to reach its conclusion. These comments were, however, crucial to the development of the law.

### Analysing the Cases: OBITER DICTA

- 9.5 A judge will often express an opinion on matters not actually raised by the case, speculating on how the outcome would have been different if the circumstances were changed. These hypotheticals can be very useful as a guide as to how a court might react in the situations described, but if it is not actually based on the facts of the particular case in front of the judge, it cannot form a **binding** precedent. It is merely **persuasive**.
- 9.6 These tangential statements of principle are known as **OBITER DICTA** which means "other things said". In several key cases, these persuasive *obiter dicta* have proved to be far more important in the development of the law than the *ratio decidendi*. A very good example of this is ***Hedley Byrne v. Heller and Partners* [1964] AC 456** as discussed above. (This case is analysed in Appendix 2 below.)

## 10 THE COMMON LAW: The Hierarchy of the Courts

### Introduction

- 10.1 If every court were bound by the decisions of every other court, the law would never change (except by statute), and there would be no point in appealing from one court to another as they would all be bound by the first decision. This, of course, is not the case. Whether a decision is binding on a particular court depends on where it is in the hierarchy. The basic rules are as follows.

### The House of Lords/ Supreme Court

- 10.2 Until July 2009, the Appellate Committee of the House of Lords was the highest domestic court in England. Its functions have now been adopted by the new "Supreme Court". It is not bound by any other court on domestic matters, although it must follow the Court of Justice of the European Union on matters of European Law (subject to any post-Brexit changes.). Since 1966 the House of Lords/ Supreme Court has been free to overturn its own decisions where appropriate.

### The Court of Appeal (Civil Division)

- 10.3 The Court of Appeal (Civil Division) is bound by both the House of Lords/ Supreme Court and by its own previous decisions. This is known as the rule in **Young v. Bristol Aeroplane Co. Ltd [1944]** KB 718, and is subject to the following exceptions:
1. Where there are two conflicting decisions of the Court of Appeal it may choose which to follow
  2. Where the previous decision of the Court of Appeal has been overruled or conflicts with a House of Lords/Supreme Court decision
  3. Where the decision was made *per incuriam* (i.e. incorrect as a matter of law).
- 10.4 In **Davis v. Johnson [1978]** 2 WLR 182, Lord Denning attempted to dispense with the rule in **Young v. Bristol Aeroplane Co.** so that he could overrule earlier decisions of the Court of Appeal, but he was firmly slapped down by the House of Lords.

*"Lord Denning MR has conducted what may be described as a one-man crusade with the object of freeing the Court of Appeal from the shackles of stare decisis... In my opinion, this House should take this occasion to re-affirm expressly, unequivocally and unanimously that the rule laid down in the Bristol Aeroplane case as to stare decisis is still binding on the Court of Appeal."* per Lord Diplock

### The Court of Appeal (Criminal Division)

- 10.5 The Court of Appeal (Criminal Division) is normally bound by similar rules, except that it may overrule itself if not to do so would leave an innocent person in gaol.

### The High Court

- 10.6 The High Court is bound by the Court of Appeal and the House of Lords/Supreme Court, but not by its own previous decisions. It binds the lower courts (such as the County Court) and its decisions are often applied even in the higher courts. In practice, a High Court judge will, as a matter of judicial comity, usually follow the decision of a fellow High Court judge, unless convinced that the first decision is wrong.

## The Divisional Court

- 10.7 The High Court may sit as an appeals court from the lower courts, usually with two judges. The most common use of this is when the Divisional Court of the Queen's Bench Division sits to hear appeals 'by way of case stated' on points of law from the Magistrates' Court. The decisions of the Divisional Court are only binding on themselves and lower courts when two or more judges are sitting.

## The Crown Court, Magistrates' Court and County Court

- 10.8 These do not set binding precedents though their decisions may provide important indicators of contemporary jurisprudence and judicial thinking.

## The Privy Council

- 10.9 The Supreme Court (formerly the House of Lords) sitting to hear appeals from Commonwealth cases is not binding on the English courts, but may be highly persuasive. Several key tenets of English law are based on Privy Council decisions, such as the tests of remoteness in negligence<sup>10</sup> and private nuisance.<sup>11</sup>

## Following and Applying Precedents

- 10.10 Where a court is bound or persuaded to comply with a precedent, the court will either "follow", "approve" or "apply" that precedent, depending on the context.

APPLIED: This is where a court applies a principle of law enunciated in a court of inferior jurisdiction, even though it is not bound to do so: e.g. if the Supreme Court applies a principle stated in a Court of Appeal case.

APPROVED: This is where a court approves of a principle of law enunciated in a court of inferior jurisdiction, but without applying it to its own case. This *obiter* endorsement can be very influential in later cases.

FOLLOWED: This is where a court applies a principle of law enunciated in a court of co-ordinate or superior jurisdiction, because it is bound to do so under the doctrine of precedent.

AFFIRMED: This term is used in appeal cases, where the appellate court upholds the decision of the lower court.

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<sup>10</sup> *Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co (The Wagon Mound No.1)* [1961] AC 388 Privy Council.

<sup>11</sup> *Overseas Tankship (UK) Ltd v. Miller Steamship Co Pty Ltd (The Wagon Mound No.2)* [1967] 1 AC 617 Privy Council.

# 11 THE COMMON LAW: Disregarding Precedents

## Introduction

- 11.1 All courts, wherever they stand in the hierarchy, have means at their disposal to avoid being bound by a precedent that they do not like. These means are employed sparingly, so as not to upset the coherence of the legal system, but are sometimes necessary where previous cases have created rules that produce injustice (for example, because those rules can no longer be sensibly applied in the light of modern social values or modern commercial practice).
- 11.2 A precedent which appears to be binding may sometimes not be followed:
- If the material facts of the two cases are so different that it can be **distinguished**;
  - If the previous *ratio decidendi* is too obscure to be certain;
  - If the previous decision was *per incuriam* (incorrectly decided as a matter of law);
  - If the previous decision has been **over-ruled**.

## “Not Following”, “Doubting”, “Disapproving” and “Overruling”

- 11.3 Higher courts try to follow the principles laid down by lower courts so far as possible, so as to provide certainty and coherence in the law. However, where a higher court does not agree with the previous decision of a lower court, it is not bound to follow it. In such circumstances, the higher court says that it will “not follow” or will “not apply” the earlier decision. The earlier decision can also be “doubted” or “disapproved”. All these three ways of departing from precedent are regarded as warnings (of varying degrees of severity) to lower courts that they should be cautious about following the precedent in the future.

If the higher court feels that the earlier decision should never be followed in the future, it may “overrule” the decision. “Overruling”, then, is where a principle which has been established in a lower court is clearly and expressly overturned by a higher court.

An example of this can be found in ***Hedley Byrne & Co v. Heller & Partners* [1964] AC 465**, where the House of Lords overruled the Court of Appeal on the principle the Court of Appeal had stated in ***Candler v. Crane, Christmas & Co* [1951] 2 KB 164**, namely that there could be no liability in English law for negligent misstatement leading to pure economic loss.

## “Distinguishing”

- 11.4 Distinguishing is probably the most important tool a court has when deciding whether it is bound by a precedent. Normally, as we have seen, a court cannot avoid being bound by precedent when faced with an earlier decision from a higher court. However, a court which is unhappy about following such a precedent may seek to “distinguish” it from the case it is deciding. All judges, in courts at all levels, can “distinguish” a precedent.

“Distinguishing” a precedent involves stating that the facts or circumstances of an earlier case are so different from those of the case now being decided, that the earlier case has no relevance to the case in hand. In other words, although the early principle is correct, it cannot sensibly be thought to cover the facts or context of the present case, and so does not provide an applicable precedent.



## The Practice Statement 1966

- 11.5 The Supreme Court, when wishing to avoid one of its own past decisions (or one of the former House of Lords), may openly depart from that decision without resorting to distinguishing it, in accordance with the Practice Statement 1966. This is dealt with below.

### Precedent, Principle and Policy

- 11.6 Many areas of the Common Law are rooted in social or commercial policy. For example, the principles governing the law of contract arose from the desire of the courts to give legal effect to reasonable commercial expectation, so decisions on matters of contract will sometimes reflect trade practice rather than a strict application of *stare decisis*.<sup>12</sup>
- 11.7 Similarly in the tort of negligence, the courts have been ever-mindful of the need to prevent a floodgate of claims in particular types of action, as these may be impractical to deal with and cause disproportionate liability on a defendant. Thus the courts have sometimes interpreted their own previous decisions very widely or very narrowly as the case demands, or even discarded them entirely.<sup>13</sup>

This apparent contradiction between the doctrine of precedent and the demands of pragmatism may be seen as either one of the great strengths or as one of the fundamental weaknesses of the Common Law system. Which it is may be seen as a moot point!

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<sup>12</sup> See for example *Transfield Shipping Inc v. Mercator Shipping Inc (The Achilles)* [2009] 1 AC 61 (HL). A charterer delivered a ship back late to the owners, who lost money on a follow-on charter as a result. Although the normal rules of contractual damages would have meant that the charterer should pay the owners for their foreseeable loss, the House of Lords held, *inter alia*, that imposing such liability was disproportionate and not in accordance with usual trade practice in the shipping sector, and so refused to uphold the claim.

<sup>13</sup> See for example the cases relating to claims for pure economic loss caused by negligence.

## **EXERCISE TWO: Case Analysis**

### **1. Read the judgments in the case of *Fisher v. Bell* [1960] 3 WLR 919**

1. What was the legal issue in this case?
2. What was the decision reached by the judges?
3. What was the *ratio decidendi*?
4. Are there any *obiter dicta*?

### **2. Read the judgments in the case of *Hinz v. Berry* [1970] 2 QB 40**

5. In which court was this case decided?
6. Who were the judges in this case, and what kind of judges were they?
7. What was the date of the judgment at first instance?
8. What does the abbreviation M.R. stand for?
9. In which court was the first instance decision made? How do you know?
10. Who was the judge at first instance?
11. Who was the appellant in this case?
12. Who were the solicitors in the case? Why might it be important to know this?
13. Who was counsel for the appellant?
14. Was the case of *Schneider v. Eisovitch* followed, overruled or distinguished?
15. Was the respondent the claimant or the defendant?
16. What is meant by 'nervous shock'?
17. For what injuries may damages be awarded in a case such as this?
18. Did all the judges agree with the award of £4,000 in relation to the nervous shock?
19. What is/are the *ratio decidendi* of this case?
20. What *obiter dicta* are there in this case?
21. What policy issues do the judgments illustrate?

### **3. General questions about reading cases**

22. What is meant by the abbreviation Q.C.?
23. What is meant by *cur adv vult*?
24. What does SC(E) mean?
25. What is meant by a "neutral citation"?
26. What does the expression *per curiam* mean?
27. What does the expression *per incuriam* mean?
28. If a case were called *R. v. Smith*, would it be a criminal or a civil case, and how would you say it?
29. What was the former name for a claimant?
30. What is the significance of [ ] or ( ) around the date in a citation?

## **EXERCISE THREE: Advanced Case Analysis**

**Write a critical summary of the judgment in *Hedley Byrne v. Heller* [1963] UKHL 4, [1964] AC 465.**

Your analysis should include:

- A brief summary of the facts pertinent to the decision
- An explanation of the legal issues involved in the decision
- The judgment
- The ratio decidendi
- The obiter dicta
- A discussion of the significance, if any, of this case

**n.b. This question is discussed in detail in Appendix 3 below.**

## **12 THE DOCTRINE OF EQUITY**

### **Historical Context**

- 12.1 The early common law system suffered from several defects which could lead to injustice.

One particular aspect of this was famously highlighted by the experience of the crusaders in the 12<sup>th</sup> century. These were the men who went to the Eastern Mediterranean to fight to restore the holy sites to Christianity, under the banner of the King of England. As they (rightly) anticipated they would be away from England for several years, they transferred the title to their land to trusted relatives and friends to manage the estate and pay/collect taxes, on the understanding that the land would be conveyed back to them on their return. Unfortunately, some of these 'trustees' refused to hand back the land, and under the common law, as they had been given legal title to the land, they were under no legal obligation to return it.

The dispossessed crusaders would petition the King (who was above the law) to get their land returned to them, and the King would direct the complaints to his spiritual advisor, the Lord Chancellor, who decided the cases on the principles of fairness (equity). He usually ordered the return of the property to the crusaders on the basis that it was unconscionable for the trustees to deny the claims. Thus was created a parallel set of precedents, forming the basis of the law of trusts.

- 12.2 A similar problem with the early common law was that an action could only be commenced by the issue of a royal writ, a document stating the complaints. By the 14<sup>th</sup> century, the common law courts (principally the Court of the King's Bench, the Court of Common Pleas and the Exchequer) refused to accept any new writs. Many complaints were not covered by the available writs, and so could not be brought to court. In particular, the only remedy offered by the common law courts was financial compensation (damages) whereas some claimants demanded specific performance or injunctions.

Again, the King, through the Lord Chancellor, could decide the cases on the principles of equity, permitting new remedies and causes of action to arise outside the strictures of the common law.

- 12.3 By the 15<sup>th</sup> century, petitions were being made directly to the Lord Chancellor who set up the Court of Chancery to deal with them. This was more powerful than the highest nobles, could order new writs not available at common law and could offer remedies other than damages (such as injunctions and specific performance). New rights were created in the name of "equity" and a refusal to comply with an order of the court could lead to imprisonment for contempt.
- 12.4 A major criticism of this system was that it was somewhat haphazard. The early Lord Chancellors were ecclesiastics with no legal training and they had little regard for establishing or following precedents, so equitable remedies could be as diverse and inconsistent as the character and whims of the incumbent Lord Chancellor.

As the 17<sup>th</sup> century jurist John Seldon famously commented:

*"Equity is a roguish thing: for law we have a measure, know what to trust to: equity is accordance to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot: what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in a Chancellor's conscience."*<sup>14</sup>

- 12.5 Thus, two parallel sets of laws developed. These frequently came into conflict, but in the *Earl of Oxford's Case* (1615)<sup>15</sup> it was decided that where there was such a conflict, equity should prevail.

### ***The Earl of Oxford's Case* (1615) 21 ER 485**

The Ecclesiastical Leases Act 1571 provided that conveyances of estates by Masters of any college for anything other than a term of 21 years or 3 lifetimes should be void. (This was to prevent the officials of Oxford and Cambridge selling off the university property for short-term gain.)

Not knowing of this prohibition, the Master of Magdalene College, Cambridge, sold some land in east London to Queen Elizabeth I. The Queen granted the land to Benedict Spinola, who sold it in 1580 to the Earl of Oxford. The Earl built 130 houses on the land, one of which was leased to John Warren. All the buyers and tenants in this chain took the land in good faith, wrongly presuming that any grant of land by the Queen would be exempt from any contrary legislation.

In 1604 however, the then-Master of the college, Barnabas Gooch, knowing that the Act prohibited the original conveyance, leased the same land to John Smith, who took the legal title. There was thus a dispute as to whether the 'equitable' tenant or the 'legal' tenant had the better claim.

The jury found for the original tenant, believing that the long-term sale to Queen Elizabeth was legal, despite the contrary legislation.

The case went to the Court of the King's Bench, where Chief Justice Coke held that the statute must prevail, even where the monarch was involved, so that the sale to Queen Elizabeth was void and the new tenancy to John Smith was valid.

The successors in title to the Earl of Oxford then took the case to the Court of Chancery, where the Lord Chancellor, Lord Ellesmere, applied the doctrine of equity to prohibit the

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<sup>14</sup> John Selden (1584-1654) *The Table Talk of John Selden* (1856) published by John Russell Smith, London.

<sup>15</sup> (1615) 21 ER 485.

common law order made by the King's Bench, and to give the Earl of Oxford (and his heirs) the right to quiet enjoyment of the land.

The matter was then referred to the King, James I, as it seemed that both parties had an equally good claim: so would the common law or equity prevail? James I referred the matter to his Attorney Generals, who recommended that he find in favour of Lord Ellesmere, which he did, making it clear in a declaration that where there was a conflict between the common law and equity, equity should prevail.

*"As mercy and justice be the true supports of our Royal throne; and it properly belongeth to our princely office to take care and provide that our subjects have equal and indifferent justice ministered to them; and that when their case deserveth to be relieved in course of equity by suit in our Court of Chancery, they should not be abandoned and exposed to perish under the rigour and extremity of our laws, we do approve, ratify and confirm, as well (i.e. proper and superior) the practice of our Court of Chancery."*

- 12.6 This was given statutory basis by the Judicature Acts 1873-1875.
- 12.7 Until these Judicature Acts, only the Court of Chancery could administer 'equity'. This caused tremendous expense and delays as all equity cases had to go first to the courts of the common law. After the Acts, all courts were empowered to administer either common law or equity.

## **Current Context**

- 12.8 Equitable remedies are discretionary and will only be available where the common law proves inadequate. These remedies include *injunctions*, *specific performance*, *rectification*, and *rescission*. However some equitable concepts (such as trusts) are so entrenched as to have developed into an independent area of law.
- 12.9 The rules of equity play an important part in ensuring fair play in the courts. Equity is not available, however, to those who have not acted in good faith. (You must come to equity with 'clean hands'.)
- 12.10 The Lord Chancellor is no longer a judicial office, but is now the title given to the Minister of Justice, currently Rt Hon Robert Buckland QC MP.

## **13 LAW OF THE EUROPEAN UNION**

### **Historical Context**

- 13.1 The United Kingdom became a member of the European Economic Community (EEC) in 1973, and by acceding to the Treaty of Rome, agreed to be bound by the law as created by the legislative bodies of the Community. By the European Communities Act 1972, the UK Parliament gave precedence to European Community Law where it was in conflict with domestic legislation. Thus, it appeared to have fettered its own power. However it was always open to Parliament to withdraw from what has now become the European Union, and on January 31<sup>st</sup> 2020, it did just that by implementing the European Union (Withdrawal) Act 2018, s.1.
- 13.2 The Single European Act 1986 assisted the free movement of goods and extended majority voting to most areas of the single market programme.

- 13.3 The Treaty of European Union (Maastricht Treaty) 1992 created the European Union itself (of which the newly named European Community was the most important part) and further extended its powers and policies. The Treaty of Amsterdam 1997 clarified the common foreign and security policy. The Treaty of Nice 2001, which entered into force in 2003, prepared the EU for its enlargement to the present 28 Members (including Croatia since July 1 2013.)
- 13.4 A Treaty seeking to establish an EU Constitution was agreed at the international level in 2004 but was rejected in referendums that took place the following year in two Founder Member States (France and the Netherlands), so was not adopted. A new Treaty, the Lisbon Reform Treaty was then approved in 2007 and entered into force in December 2009.

## **Brexit**

- 13.5 Under Article 50 of the Treaty of the European Union, EU member states have the right to withdraw from the Union. In a referendum on 23 June 2016, 51.9% of the participating UK electorate voted to leave the EU. On 29 March 2017, the British government invoked Article 50.

The path to withdrawal was extremely fraught for the Conservative government, and it was not until 22 January 2020, that the UK Parliament gave final approval to the Withdrawal Agreement, which was signed on behalf of the European Union and the United Kingdom on 24 January 2020.

The UK officially left the European Union on 31 January 2020. On 24 December 2020, with just a week to spare before a 'No Deal Brexit' would have been triggered, the UK Government reached a trade deal with the EU.<sup>16</sup>

## **Content of the Law of the European Union**

### **The Treaties**

- 13.6 Since the Lisbon Treaty changes we now speak of two Treaties, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). These two treaties have now incorporated and replaced the previously existing treaties mentioned above.

### **Regulations**

- 13.7 These are IMMEDIATELY binding on all member states without adoption by the national parliament. They apply directly and prevail over national law.

### **Directives**

- 13.8 These are issued to the Government, requiring that national laws should be altered to conform within a specified period (usually about 2 years).

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<sup>16</sup> Trade and Cooperation Agreement 2020: <https://www.gov.uk/government/publications/agreements-reached-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-european-union>.

## **Decisions**

- 13.9 Decisions are made by the EU institutions (mainly the Commission). They are immediately binding upon the addressee, be it a member state, an individual or a company. They are usually concerned with agriculture or competition, but may be concerned with such matters as equal pay for women, state aids etc.
- 13.10 The process of creating EU legislation is long and complex, involving The Commission (the executive body of the EU and made up of 27 Commissioners); The Council (The EU's decision making body); and The European Parliament (a body of nationally elected members). The Court of Justice of the European Union has jurisdiction to hear actions brought against member states on the ground that Treaty obligations are not being fulfilled; to judicially review acts of the EU institutions; and to rule on the interpretation of the Treaties and the validity of any of the acts of the institutions.

## **14 SUBSIDIARY SOURCES OF LAW**

### **Books of Authority**

- 14.1 Where there is no suitable precedent, the courts may consider the opinions expressed in the books of eminent legal experts. These books clearly have no precedential value at all, but they can be a useful source of inspiration for judges.

### **Custom**

- 14.2 To some extent, all common law is based on custom, but more specifically a local custom (such as a right to have cattle fenced in) may be upheld as a legal right or duty if it has been exercised since 'time immemorial' (which technically means since 1189, but actually means as long as anyone can remember), and has been exercised peaceably, continuously and as a matter of obligation. It is rare to find examples nowadays, but they tend to involve things like rights of way and the right to graze sheep on common land.

### **Legislative Documents**

- 14.3 Documents such as Green or White papers have no binding force, but may be persuasive when considering the meaning of a statute which emanated from them. Similarly with documents such as Parliamentary, Government or NGO reports.

### **Law of Other Jurisdictions**

- 14.4 Courts will sometimes consider the way the law has developed in other countries as guidance for how it should develop in England. This will especially be the case if the country in question has a common law system based on the English one, such as Australia, Canada and the US.

## 15 STATUTORY INTERPRETATION: Introduction

- 15.1 It is in the nature of language to be ambiguous, and so courts are often faced with the task of deciding which of several meanings should be given to a statute. In this way, Statute Law gives way to some extent to the Common Law, as the decisions of the judges as to what the statute means may themselves become precedents for later cases.
- 15.2 To avoid ambiguity or misinterpretation, statutes often contain elaborate glossaries and explanatory schedules. There is also the Interpretation Act 1978, which defines certain commonly used terms. However, in the end it is still up to the court to interpret them, and judicial practice has not been at all consistent either over the centuries, or even from case to case! Furthermore, there are some statutes which seem to defy all sensible interpretation!
- 15.3 In recent years, there has also been a general shift in approach from the old 'literal' style of interpretation to a much more 'purposive' approach.
- 15.4 The overwhelming majority of judicial reviews concern disagreements over the way a statute is to be interpreted. Cases focus on whether a particular piece of legislation can be interpreted as giving public decision-makers power to do what they have done, or intend to do. It is therefore especially important to the study of Public Law to understand the main approaches to statutory interpretation in English law.

These approaches have evolved radically in the last fifty years. More recently they have been heavily influenced by the interpretative techniques of the European Court of Justice and the European Court of Human Rights.

### Presumptions of Statutory Interpretation

- 15.5 Unless a statute clearly indicates the opposite, a court will presume *inter alia* that a statute is **NOT** meant to have any of the following effects:
- to alter the common law
  - to deprive someone of their liberty or property or otherwise to interfere with their private rights
  - to enable someone to benefit from their wrongdoing
  - to make the Crown liable
  - to make someone retrospectively liable (cf. War Crimes Act 1991)
  - to be incompatible with UK obligations in International Law
  - to be incompatible with the Human Rights Act 1998



## 16 STATUTORY INTERPRETATION: The General Rules

- 16.1 The courts have invented for themselves various 'rules' of interpretation, though they are not always applied consistently, and are to some extent contradictory.

### The Literal Rule

- 16.2 Literalism involves an emphasis on the *plain meaning* of the words Parliament has used. As long as the words have a clear meaning, the courts will interpret the statute according to that meaning, even if the result is absurd. This is said to promote certainty and to preserve parliamentary sovereignty, though in fact it might do neither.

- 16.3 ***Shah v. Barnet London Borough Council* [1983] 1 All ER 226 (HL)**

*[It] helps to prevent the growth and multiplication of refined and subtle distinctions in the law's use of common English words. Nothing is more confusing and more likely to bring the statute law into disrepute than proliferation by judicial interpretation of special meanings, when Parliament has not expressly enacted any."* per Lord Scarman at p.237

- 16.4 ***The Sussex Peerage Case* [1844] XI C & T 1035**

*"The rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such cases, best declare the intention of the Legislature."* per Lord Tindall CJ

- 16.5 ***Hill v. East and West India Dock Co.* [1884] 9 App Cas. 448**

*"I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems absurd to one man does not seem absurd to another... I think it is infinitely better, although an absurdity or an injustice or other objectionable result may evolve as the consequence of your construction, to adhere to words of an Act of Parliament and leave the legislature to set it right than to alter those words to one's notion of an absurdity."* per Lord Bramwell

- 16.6 ***R v. Judge of the City of London Court* [1892] 1 QB 237**

*"If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the Legislature has committed an absurdity."* per Lord Esher

### The Golden Rule

- 16.7 Even applying the literal rule of interpretation, the courts may find the statutory language ambiguous. To avoid such problems, many statutes contain elaborate glossaries or guidelines as to the meanings of words. When all else fails, however, the 'golden rule' states that the court should just adopt whichever meaning makes the most sense in the context.

16.8 **Grey v. Pearson [1857] 6 H.L. Cas 61**

*"The grammatical and ordinary sense of the word is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."* Lord Wensleydale

- 16.9 One particular problem with this rule is that it involves the judge in deciding what an 'absurd interpretation' would be, which is itself a highly subjective matter.

**John Willis 'Statute Interpretation in a Nutshell' 16 Canadian Bar Review 1938 p13**

*"'Absurdity' is a concept no less vague and indefinite than 'plain meaning': you cannot reconcile the cases upon it. It is infinitely more a matter of personal opinion and infinitely more susceptible to the influence of personal prejudice."*

## **The Mischief Rule/ The Purposive Approach**

- 16.10 Despite the historic pre-eminence of the literal rule of interpretation, there has long been an alternative approach which is to interpret a statute according to the known mischief that it was purporting to remedy. A problem with this approach was the former reluctance of the courts to consult Parliamentary documents to discern what that mischief might have been. However, they would consider earlier common law cases and the wording of the Act itself, especially the long title and the preamble, which in old statutes often used to contain a detailed explanation of the purpose of the Act.

**Heydon's Case (1584) 3 Co. Rep. 7a**

*"For the sure and true interpretation of all statutes in general, four things are to be discerned and considered:*

*1<sup>st</sup> What was the Common Law before the making of the Act*

*2<sup>nd</sup> What was the mischief and defect for which the Common Law did not provide*

*3<sup>rd</sup> What remedy the Parliament hath resolved and appointed...*

*4<sup>th</sup> The true reason of the remedy;*

*and then the office of all Judges is always to make such construction as shall suppress the mischief, and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief... and to add force and life to the cure and remedy, according to the true intent of the makers of the Act."* per the Barons of the Court of Exchequer

- 16.11 Although modern statutes do not have elaborate preambles, the mischief rule has morphed somewhat into the *purposive approach to interpretation*, which permits consideration of both the obvious social purpose of a statute, and even of pre-legislation Parliamentary documents in some cases. (See below).

## 17 STATUTORY INTERPRETATION: Other Rules

- 17.1 In addition to these general rules, there are several other principles of interpretation:

### ***Noscitur a soci***

- 17.2 “A word is known by the company it keeps.” The court can read the whole statute to see what a word or provision means in context. This is also known as the ‘contextual rule’.

### ***Expressio unius est exclusio alterius***

- 17.3 ‘The express mention of a person or a thing implies the exclusion of another.’

#### ***Tempest v. Kilner* [1846] 3 CB 249**

Under the section 17 of the (now repealed) Statute of Frauds 1677, a contract for the sale of “goods, wares and merchandise” will be void if the memorandum of sale did not disclose the price.

The defendant sold shares in a company to the plaintiff, but then did not deliver them, causing the plaintiff a massive loss on potential profits of £150. The defendant pleaded, *inter alia*, that there was no contract because, although the price had been agreed orally, it did not appear in the memorandum of sale, contrary to the Statute of Frauds.

HELD: The sale of shares was not the sale of “goods, wares and merchandise” as listed in the statute, so the section did not apply.

### ***Ejusdem generis***

- 17.4 ‘Of the same kind.’ If a list ends with an expression such as ‘and other things’, it is assumed that the ‘other things’ are of the same type as the things in the list.

#### ***Powell v. Kempton Park Racecourse Co.* [1899] AC 143 (HL)**

According to section 1 of the (now repealed) Betting Act 1853 “No house, office, room **or other place** shall be opened, kept or used for the purpose of the owner or any person using the same for betting with persons resorting thereto.”

Adjacent to a racecourse there was an uncovered enclosure of about a quarter of an acre, fenced in by iron rails, to which, when race-meetings were held, the public were admitted by the owners of the racecourse on payment of an entrance fee. Among the persons so admitted were always many professional bookmakers, and most of the persons admitted, other than the bookmakers, went for the purpose of backing horses with the bookmakers.

The question for the court was whether this enclosure constituted an ‘other place’ for the purposes of the Betting Act 1853. The majority of the House of Lords held that it did NOT do so, *inter alia* because it was not a ‘place’ of the same type as the other places in the list.

*“Speaking in general terms, whilst the place mentioned in the Act must be to some extent ejusdem generis with house, room, or office, I do not think that it need possess the same characteristics; for instance, it need not be covered in or roofed. It may be, to some extent, an open space. But certain conditions must exist in order to bring such space within the word “place.” There must be a defined area so marked out that it can be found and recognised as “the place” where the business is carried on and wherein the bettor can be found. Thus, if a person betted on Salisbury Plain, there would be no “place” within the Act.*

*The whole of Epsom Downs or any other racecourse where betting takes place would not constitute a place...*

*"Was the enclosure (in this case) opened, kept, or used for the purpose of the owner, occupier, or any person using the same, or of any person conducting the business thereof, betting with persons resorting thereto? In my opinion this question must be answered in the negative. For I think that the certain conditions I have just referred to do not exist, and that in consequence of the absence of those conditions this enclosure cannot be held to be "a place" wherein an offence has been committed." per Lord James*

## 18 LITERAL APPROACH v. PURPOSIVE APPROACH

- 18.1 During the 1960s, the courts started to move away from literalism, towards an emphasis on the *purpose* of Parliament in passing the statute - the purposive or teleological approach. At first, this approach was vigorously resisted by the House of Lords. This resistance was based on *constitutional* doctrines - the separation of powers; the sovereignty of Parliament; and the Rule of Law.
- 18.2 Denning L.J. in the Court of Appeal was all for adopting the more liberal approach to interpretation – to 'rewrite' statutes to give them their 'proper' effect – but the House of Lords were not so keen.

***Magor and St Mellons Rural District Council v. Newport Corporation [1950] 2 All ER 1226 (CA)***

*"We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is any easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis." per Denning L.J.*

***Magor and St Mellons Rural District Council v. Newport Corporation [1951] 2 All ER 839 (HL)***

*"Nor should I have thought it necessary to add any observations of my own were it not that the dissenting opinion of Denning L.J. appears to invite some comment... He said: "We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."*

*"The general proposition that it is the duty of the court to find out the intention of Parliament – and not only of Parliament but of Ministers also - cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery is strictly limited... The second part of the passage that I have cited from the judgment of the learned Lord Justice is, no doubt, the logical sequel to the first.*

*"The court, having discovered the intention of Parliament and of Ministers too, must proceed to fill the gaps. What the legislature has not written, the court must write. This proposition...cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation, and it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act."*

per Lord Simonds

- 18.3 However, it is now far more common to find judges adopting a purposive approach to statutory interpretation: that is, to interpret the statute to give effect to its purpose – even if it means defying the literal meaning of the wording. This is similar to the old ‘mischief rule’, except that the courts are now even prepared to consider extrinsic sources – such as the reports of Parliamentary proceedings (‘Hansard’) – where relevant.
- 18.4 This change in attitude may be attributed in part to the effect of European Union Law, where purposive methods of interpretation are generally required.

**283/81 CILFIT [1982] ECR 3415**

*“Every provision of Community [now EU] Law must be placed in its context and interpreted in the light of the provisions of Community Law as a whole, regard being given to the objectives thereof.”*

***Nothman v. London Borough of Barnet [1978] 1 All ER 1243***

*“In all cases now in the interpretation of statutes we adopt such construction as will ‘promote the general legislative purpose underlying the provision.’”*

per Lord Denning at p.124

- 18.5 Note the extent to which the courts were prepared to veer away from the apparently clear words of the statute in the following cases.

***Padfield v. Minister of Agriculture [1968] AC 997 (HL)***

Milk producers were dissatisfied with the Milk Marketing Board’s scheme for milk pricing. Under the Agricultural Marketing Act 1958 the Minister could set up a committee of investigation to examine such complaints “*if the Minister in any case so directs*”. The Minister refused to refer the complaint to the committee on the grounds *inter alia* that the complaint raised wide issues. He argued that the statutory wording gave him an unfettered (i.e. an unlimited) discretion.

HELD: The Minister’s discretion was not unlimited. He would not be allowed to use his statutory discretion to thwart or run counter to the policy and objects of the Act. The policy and objects of the Act must be determined by construing the Act as a whole. Here, the Minister had taken an irrelevant consideration into account because it was plainly the intention of the Act that even the widest issues should be investigated if the complaint was genuine and substantial. He was using his discretion to thwart or run counter to the policy and objects of the Act, so the court was entitled to intervene.

*“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; **the policy and objects of the Act must be determined by construing the Act as a whole** and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court... I have found no authority to support the unreasonable proposition that it must be all or nothing - either he has no discretion at all or an unfettered discretion. Here the words “if the Minister in any case so directs” are sufficient to show that he has some discretion but they give no guide as to its nature or extent. That must be inferred from a construction of the Act read as a whole, and for the reasons I have given I would infer that the discretion is not unlimited, and that it has been used by the Minister in a manner which is not in accord with the intention of the statute which conferred it.”* [Emphasis added.] per Lord Reid

*"My Lords, I believe that the introduction of the adjective 'unfettered' and its reliance thereon as an answer to the appellants' claim is one of the fundamental matters confounding the Minister's attitude, bona fide thought it be. First, the adjective nowhere appears in section 19, it is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective, I doubt if it would make any difference in law to his powers... [T]he use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives."* per Lord Upjohn

18.6 **R v. Pigg [1983] 1 WLR 6 (HL)**

The Juries Act 1974, s.17 provides as follows:

**Majority verdicts**

**(1) Subject to subsections (3) and (4) below, the verdict of a jury in proceedings in the Crown Court or the High Court need not be unanimous if—**

**(a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and**

**(b) in a case where there are ten jurors, nine of them agree on the verdict...**

**(3) The Crown Court shall not accept a verdict of guilty by virtue of subsection (1) above unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict.**

Stephen Pigg had been tried for attempted rape. At the end of the trial, the following exchange took place:

The clerk: "Would the foreman please stand? Mr Foreman, would you answer my question either yes or no only? Members of the jury, have at least 10 of you agreed upon a verdict?"

The foreman: "Yes."

The clerk: "On the charge of rape, do you find the accused guilty or not guilty?"

The foreman: "Not guilty."

The clerk: "On the charge of attempted rape, do you find him guilty or not guilty?"

The foreman: "Guilty."

The clerk: "Is that the verdict of you all, or by a majority?"

The foreman: "By a majority."

The clerk: "How many of you agreed to the verdict and how many dissented?"

The foreman: "10 agreed." The clerk: "10 agreed to two of you."

According to the transcript, the foreman said nothing in reply to the clerk's last statement, either by way of agreement or by way of disagreement.

Pigg contended that as the precise form of words used by the foreman did not correspond with the requirement in s.17(3) of the Juries Act 1974, he had not, in fact, been properly convicted.

HELD: The precise form of words used by the clerk and foreman did not constitute an essential part of the statutory requirement. All that was necessary was that the words used by the clerk and foreman made it clear to an ordinary person how the jury was divided.

*"One is left with what seems to me to be the overwhelming argument, in a case where there are 12 jurors, that, if the foreman of the jury states no more than that the number agreeing to the verdict is 10, it is nevertheless a necessary and inevitable inference, obvious to any*

ordinary person, that the number dissenting from the verdict is two. True it is that the foreman of the jury has not said so in terms as section 17(3) of the Act of 1974, interpreted literally, requires. In my opinion, however, it is the substance of the requirement prescribed by section 17(3) which has to be complied with, and the precise form of words by which such compliance is achieved, so long as the effect is clear, is not material...

*"In short, compliance with the requirement of section 17(3) of the Act of 1974 is mandatory before a judge can accept a majority verdict of guilty; but the precise form of words used by the clerk of the court when asking questions of the foreman of the jury, and the precise form of words used by the latter in answer to such questions, as long as they make it clear to an ordinary person how the jury was divided, do not constitute any essential part of that requirement."* per Lord Brandon at p.13

#### 18.7 **Re X (A Minor) [1994] 3 All ER 372 (CA)**

S.50 Adoption Act 1976 provided - *in seemingly absolute terms* - that a Register of Adoptions was to be maintained and made available to members of the public. The case involved a mother who had a personality disorder and was prone to aggressive and violent behaviour. A local authority applied for an order restricting the information to be placed on this register by omitting the names, address and occupations of the adopters, on the grounds that there was a real risk that the mother would attempt to trace the child and disrupt the child's placement.

HELD: The welfare of the child was the paramount consideration, and so the court could exercise its inherent jurisdiction by making an order restricting disclosure of the details entered in the Register. Accordingly during the child's minority the details were not to be disclosed without the leave of the court.

## 19 THE USE OF EXTRINSIC SOURCES

- 19.1 A major boost to the judges who advocated the purposive method of interpretation was the decision of the House of Lords in **Pepper (Inspector of Taxes) v. Hart [1993]**, where, for the first time, the House permitted the use of *Hansard* to discover why an Act was passed, an interpretive aid which had long been mooted for by Lord Denning.

### **The position prior to *Pepper v. Hart***

- 19.2 **Davis v. Johnson [1979] AC 264**

*"Some may say, and indeed have said, that judge should not pay attention to what is said in Parliament. They should grope around in the dark for the meaning of an Act without switching on the light. I do not accede to this view."* per Lord Denning at p.267

*"First, such material is an unreliable guide to the meaning of what is enacted. It promotes confusion, not clarity. And the volume of Parliamentary and ministerial utterances can confuse by its very size. Secondly, counsel are not permitted to refer to Hansard in argument."* per Lord Scarman at p.349

- 19.3 **R. v. Local Commissioner for Administration (ex parte Bradford Metropolitan City Council) [1979] 2 All ER 881**

*"By good fortune, however, we have been given a way of overcoming that obstacle. For the ombudsman himself in a public address to the Society of Public Teachers of law quoted the relevant passages of Hansard as part of his address: and Professor Wade has quoted the very words in his latest book on administrative law, and we have not yet been told that we may not look at the writing of the teachers of law."* per Lord Denning

- 19.4 Prior to *Pepper v. Hart*, it had generally been considered impermissible for the courts to look to the parliamentary record to assess the meaning of an Act of Parliament. However the courts had already carved out an exception to this general rule in relation to the interpretation of EC law.

***Pickstone v. Freemans plc* [1989] AC 66 (HL)**

The case concerned apparent incompatibility between Community Law and the provisions of the Equal Pay Act 1970, as amended by the Equal Pay (Equal Value) Regulations 1983. The wording of the Act seemingly permitted employers to evade equal pay legislation by employing one token male on the “same work” as a group of potential woman claimants who could be deliberately paid less than a group of men employed on “work of equal value” with that of the women.

HELD: It was necessary to apply a purposive construction to the British legislation. This was the case despite the facts that the British provision seemed unambiguous, and that the purposive construction would basically involve *adding words in* to the statute.

Legislation passed to give effect to EEC obligations fell into a special category which justified recourse to a particularly creative approach to interpretation. This also made it legitimate for the courts to have regard to the parliamentary record in order to assess the intention of Parliament in passing the amendments to the 1970 Act.

**The Decision in *Pepper v. Hart***

- 19.5 ***Pepper (Inspector of Taxes) v. Hart* [1993] 1 All ER 42 (HL)**

The case involved nine schoolteachers and a bursar at Malvern College, an independent boys’ school.<sup>17</sup> Their sons were educated at the school, for one-fifth of the fees ordinarily charged, which could be up to £5,300 pa. The education of these sons was a taxable benefit under s.61 of the Finance Act 1976. When the case reached the House of Lords, it became apparent that an examination of parliamentary proceedings in 1976 might give a clear indication of whether Parliament intended the ‘cost of the benefit’ to be the actual cost to the school in providing the benefit or the market value.

It was argued that examining *Hansard* might violate Article 9 of the Bill of Rights 1689, which provides: “The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”.

HELD: (*Lord Mackay LC dissenting*) Having regard to the purposive approach to statutory interpretation which the courts have adopted to give effect to the will of the legislature, the rule prohibiting courts from referring to Parliamentary material should, subject to any question of Parliamentary privilege, be relaxed so as to permit reference to Parliamentary materials where:

1. the legislation was ambiguous and obscure or the literal meaning led to an absurdity;
2. the material relied upon consisted of statements by a Minister or other promoter of the Bill which led to the enactment of the legislation together if necessary with such other Parliamentary material as was necessary to understand such statements and their effect; and
3. the statement relied upon was clear.

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<sup>17</sup> The school is now co-ed, although the majority of students are boys.



Such use of Parliamentary materials would not violate Article 9 of the Bill of Rights 1689 since it would not amount to questioning the freedom of speech or parliamentary debate, provided the judge and counsel refrained from criticising or impugning the Minister's statements or his reasoning. The purpose of the courts would be to give effect to, rather than thwart through ignorance, the intentions of Parliament rather than questioning or criticising.

*"The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted."* per Lord Griffiths at p.617

*"In my judgment...reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases, references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words... Given the purposive approach to construction now adopted by the courts in order to give effect to the true intentions of the legislature, the fine distinctions between looking for the mischief and looking for the intention in using words to provide the remedy are technical and inappropriate."* per Lord Browne-Wilkinson

## **20 STATUTORY INTERPRETATION: Human Rights**

### **The Human Rights Act 1998, section 3**

20.1 (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights<sup>18</sup>.

(2) This section-

applies to primary legislation and subordinate legislation whenever enacted;

does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

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<sup>18</sup> See the Appendix for the Convention rights.

## The Human Rights Act 1998, section 4: Declaration of Incompatibility

- 20.2 (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
- (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility...
- (6) A declaration under this section (“a declaration of incompatibility”)—
- (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
- (b) is not binding on the parties to the proceedings in which it is made.

## The Effect of Sections 3 and 4

- 20.3 The effect of these sections is that the courts are obliged to interpret statutes on the presumption that they are meant to be compatible with the Convention, even when they were enacted before the Convention was even thought of.
- 20.4 However, it is open to the courts to declare in any given case that a statute simply cannot sensibly be construed in this way, in which case they may declare that it is incompatible, and enforce it as written – even if it violates the Convention.
- 20.5 This has led to three possibilities:
1. If the words could be construed in such a way as to make them compatible, the courts may so interpret them, even though this was clearly not the original intention of Parliament when it passed the Act.
  2. If the actual words used are clearly incompatible, but the addition of some extra words would override the problem, the courts might imply those words into the statutory provision.
  3. If the actual words used are incompatible and no tinkering or broad interpretation can change this, the courts will simply declare that the statute is incompatible, under s.4

## Re-interpreting the Original Words of the Statute

### 20.6 *Ghaidan v. Godin-Mendoza* [2004] 3 WLR 113 (HL)

Mr Mendoza had shared a flat with his gay partner, the tenant of the premises, for thirty years. When the partner died, Mr Mendoza wished to succeed to the statutory tenancy under the provisions of the Rent Act 1977. The statute said that a person living with the original tenant “as his or her wife or husband” should be treated as the spouse of the original tenant. In *Fitzpatrick v. Sterling Housing Association* [1999] 3 WLR 1113 the House of Lords had held that this provision did *not* include persons in a same-sex relationship.

HELD (by 4 to 1). Literally interpreted, the provision would breach Mr Godin-Mendoza’s right not to be discriminated against in respect of his private and family life (Article 14 ECHR in conjunction with Article 8 ECHR). Section 3(1) HRA therefore came into play. It was well within the power under s.3(1) HRA to interpret the words “as his or her wife or husband” to mean “as if they were his wife or husband”.

### **Lord Nicholls of Birkenhead**

- Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. Courts can read in words to change the meaning of the enacted legislation.
- On the other hand, Parliament cannot have intended that courts should adopt meanings inconsistent with fundamental features of the legislation involved. The interpretation must be compatible with the underlying thrust of the legislation being construed: it must “*go with the grain of the legislation*”.
- Nor can Parliament have intended that s.3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.
- No such difficulty arose in this case.

### **Lord Steyn**

- Many judges and academics had misunderstood the remedial scheme of the HRA. Those who complain of interpretations “*flouting the will of Parliament*” need to give weight to the countervailing will of Parliament expressed in the HRA.
- Furthermore, there had been an excessive concentration on the linguistic features of a particular statute, an approach which was inappropriate in the context of fundamental rights.
- Rights could only be effectively “*brought home*” if s.3(1) was the prime remedial measure and s.4 was a measure of last resort, an exceptional course.
- His Lordship denied that ***R v. A (No.2) [2002]*** involved a non-orthodox exercise of the s.3 power.
- A study of the case law showed a tendency to approach the s.3 interpretative task in too literal and technical a manner.

### **Lord Rodger of Earlsferry**

- Section 3 involves a strong obligation, but there are limits.
- There would be judicial vandalism if the courts removed the very core and essence, the “pith and substance”, of the measure that Parliament had enacted. They should not depart from cardinal underlying principles of the enactment.
- Nor was it possible to achieve compatibility by using s.3 if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible.
- On the other hand, where a provision can be read compatibly with the Convention without contradicting any principle that it enshrines or the principles of the legislation as a whole, courts may “read in” words which go further than the specific words used by the draftsman.
- Here, the fact that the partners in a homosexual relationship are not (and could not be) married was not a critical factor, nor would such an interpretation have far-reaching practical repercussions.

### Baroness Hale of Richmond

- Agreed with Lord Steyn and Lord Rodger on the effect of s.3.
- The interpretation was well within the bounds of what is possible under s.3. It was not

## Implying Additional Words into the Statute

### 20.7 **R v. A (No.2) [2002] 1 AC 45 (HL)**

A was charged with rape. He claimed that the complainant had consented. He wanted to adduce evidence of an alleged consensual sexual relationship between him and the complainant over the preceding three weeks, the most recent act of sexual intercourse having occurred one week before the alleged offence.

However, s.41 of the Youth Justice and Criminal Evidence Act 1999 seemingly precluded evidence being adduced, and questions being asked in cross-examination, about any sexual behaviour of the complainant, except with the leave of the court.

Section 41(3)(c) of the Act permits a court to give leave where the sexual behaviour of the complainant to which the evidence relates is alleged to have been so similar to sexual behaviour which allegedly took place as part of the event, that the similarity cannot reasonably be explained as a coincidence.

HELD: Section 41(3)(c), construed in accordance with the interpretative obligation in s.3(1) of the Human Rights Act, means that the test of admissibility is whether the evidential material is so relevant to the issue of consent, that to exclude it would endanger the fairness of the trial under Article 6 EHCR. Where that test was satisfied, the evidence should not be excluded. The case should be remitted to the Crown Court on this basis.

Lord Steyn made the following points about s.3(1):

1. The interpretative obligation is a *strong* one. It applies even if there is no ambiguity in the language in the sense that the language is capable of two different meanings.
2. It will sometimes be necessary to adopt an interpretation which appears linguistically strained.
3. A declaration of incompatibility is a last resort. It must be avoided unless it is plainly impossible to do so. If a clear violation of the Convention rights is expressly stated, such incompatibility will be held to arise.
4. Section 3 requires the court to subordinate the niceties of the language of the relevant statutory provision, s41(3)(c), to broader considerations of relevance.

- 20.8 **R v. A (No.2) [2002]** appears to suggest that the courts are determined to ensure an outcome which allows the Convention to prevail, even if involves completely disregarding both the statutory language and the statutory purpose. It appears to involve a judicial 'override'. Note also the tension with the purposive approach.

## A Strict Construction of the Statute: Declaration of Incompatibility

### 20.9 ***R v. Secretary of State for the Home Department ex parte Anderson*** [2003] 1 AC 837 (HL)

Mr Anderson was convicted of murdering two men in the late 1980s. Under the relevant statute it was the right of the Home Secretary to set the tariff – the period of imprisonment required to meet the requirements of retribution and general deterrence. In his case, the trial judges and the Lord Chief Justice recommended a tariff of 15 years, but the Home Secretary rejected the judicial advice and fixed a tariff of 20 years. As things stood, the statutory arrangement was that the trial judge and the Lord Chief Justice made recommendations relating to the length of the tariff, but the power of decision rested with the Home Secretary.

Mr Anderson argued that this was incompatible with his Convention right to a fair trial under Article 6, since the Home Secretary was not an “independent tribunal” within the meaning of the ECHR. He asked the House of Lords to interpret the relevant statute in conformity with s.3 HRA, in such a way as to disqualify the Home Secretary from taking part in the setting of tariffs, or alternatively to grant a declaration of incompatibility under s.4 HRA.

HELD: The function exercised by the Home Secretary was a classical sentencing function. The tariff represented an element of the punishment. The ECtHR interprets “independent” in Article 6(1) as meaning independent of the parties to the case, *and also of the executive*. Far from being independent of the executive, the Home Secretary and his junior Ministers are important members of it. Accordingly, the Home Secretary should play no part in fixing the tariff of a convicted murderer.

The question of a remedy therefore arose. It was absolutely clear from the statute that Parliament was at pains to give the decision-making power to the Home Secretary. It was not therefore “possible” under s.3 HRA to read the statute in such a way as to exclude him. Accordingly, the House would grant a declaration of incompatibility under s.4 HRA that the relevant provision was contrary to Article 6(1) ECHR.

**Lord Bingham of Cornhill:** *"Parliament was at pains to give judges a power to recommend minimum periods of detention, but not to rule. That was for the Home Secretary. To read section 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by section 3 of the 1998 Act."*

**Lord Steyn:** *"Our constitution has...never embraced a rigid doctrine of separation of powers. The relationship between the legislature and the executive is close. On the other hand, the separation of powers between the judiciary and the legislative and executive branches of government is a strong principle of our system of government. The House of Lords and the Privy Council have so stated... It is reinforced by constitutional principles of judicial independence, access to justice, and the rule of law. But the supremacy of Parliament is the paramount principle of our constitution."*

*"Whatever arguments there were about the precise nature of the Home Secretary's role in controlling the release of convicted murderers, Parliament had the power to entrust this particular role to the Home Secretary. It did so unambiguously..."*

*"Counsel for the appellant invited the House to use the interpretative obligation under section 3 to read into section 29 alleged Convention rights, viz. to provide that the tariff set by the Home Secretary may not exceed the judicial recommendation."*

*"It is impossible to follow this course. It would not be interpretation but interpolation inconsistent with the plain legislative intent to entrust the decision to the Home Secretary, who was intended to be free to follow or reject judicial advice. Section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute... It follows that there must be a declaration of incompatibility."*

## **EXERCISE FOUR: Statutory Analysis**

In each of the following real cases, consider the following issues. (The full text of these cases is at the back of this manual.)

- i) What was the purpose of the statutory provision in question?
- ii) Was the defendant guilty of an offence on a literal interpretation of the statute?

### **1. *Whiteley v. Chappell* (1868) LR 4 QB 147 (Divisional Court Case stated)**

#### ***Poor Law Amendment Act 1851***

s.3: If any person, pending or after the election of any guardian, shall wilfully, fraudulently, and with intent to affect the result of such election, personate any person entitled to vote at such election, he will be liable on conviction to imprisonment for not exceeding three months.

**At an election, Whiteley pretended to be J. Marston, a person who would have been entitled to vote, except that Marston was dead at the time of the election.**

### **2. *Fisher v. Bell* [1961] 1 QB 394 (Divisional Court Case stated)**

#### ***Restriction of Offensive Weapons Act 1959***

s.1: Any person who manufactures, sells or hires or offers for sale or hire, or lends or gives to any other person - (a) any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, sometimes known as a 'flick knife' or 'flick gun'; ... shall be guilty of an offence and shall be liable on summary conviction in the case of a first offence to imprisonment for a term not exceeding three months or to a fine not exceeding fifty pounds or to both such imprisonment and fine"

**A shopkeeper displayed such a knife in his shop window with a ticket behind it bearing the words "Ejector knife – 4 shillings."**

### **3. *Smith v. Hughes* [1960] 1 WLR 830 (Divisional Court Case stated)**

#### ***Street Offences Act 1959***

s.1: It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.

**Two common prostitutes, standing on the balcony of their house, solicited men passing in the street by tapping on the balcony rail or window pane, attracting their attention and inviting them into the house.**

4. **Adler v. George [1964] 2 QB 7** (Divisional Court Case stated)

**The Official Secrets Act 1920**

s.3: No person in the vicinity of any prohibited place shall obstruct, knowingly mislead or otherwise interfere with or impede, the chief officer or a superintendent or other officer of police, or any member of His Majesty's forces engaged on guard, sentry, patrol, or other similar duty in relation to the prohibited place, and, if any person acts in contravention of, or fails to comply with, this provision, he shall be guilty of a misdemeanour.

The defendant had obtained access to a Royal Air Force station, a prohibited place within the meaning of the Official Secrets Act 1920. Whilst in the station, he obstructed a member of Her Majesty's Forces engaged in security duty in relation to the said prohibited place.

5. **Read The Noise Act 1996 and then answer the following questions.**

1. Write a summary of the purpose and scope of the Act in less than 100 words, using proper sentences.
2. Explain what is meant by the following terms as used in the Act:
  - i) night hours
  - ii) responsible local authority
  - iii) warning notice
  - iv) permitted level
3. If equipment is seized, explain in your own words how the owner may recover it.
4. In what circumstances, if any, may the responsible local authority sell seized equipment?
5. If seized equipment is sold, what are the rights of the owner to recover the proceeds of sale?
6. What offences, if any, are created by this Act?
7. To what extent do you consider that this Act will be effective in providing a practical remedy to people who suffer from their neighbours' noise pollution? Could you suggest any amendments that would make it more effective?

6. **Read the judgment in the *Builder's Skip Case* and then answer the following questions.**

8. Write a summary of this case in less than 125 words (using proper sentences). The summary should include the material facts of the case, the point of law which was in issue, the *ratio decidendi* and the decision. Avoid including irrelevant details..
9. At one point, Russell L.J. says that "effect must be given to the plain words of the statute". To what extent, if at all, does the result of the case reflect this comment?
10. Suppose the facts of the case had been different to the extent that the requirement to remove the skip had been made face-to-face by a member of the local authority's Highways Department, who was wearing slacks and a sweater.

Would non-removal of the skip have been an offence under s.140(3) of the Act?

# PART 3: CRIMINAL LAW AND PROCEDURE

## 21 SOURCES OF CRIMINAL LAW

- 21.1 An activity will only be a crime if it has been recognised as such, either historically by the courts of the Common Law, or by Parliament (or its delegates) by legislation. Crimes are generally acts which have a harmful effect on society at large and which it is considered to be necessary to prevent, by the threat of punishment, in a civilised, well-ordered society (such as theft and murder).
- 21.2 Crimes are often seen as moral wrongs, but this view is not entirely accurate. Many crimes carry no moral stigma (e.g. parking offences) and some acts which may be considered to be immoral are not crimes (e.g. adultery.) However, some crimes are certainly based in supposed morality, even though there may be no victim (e.g. certain sexual acts between consenting adults).
- 21.3 Parliament may invent new crimes; refine existing ones; or decriminalise certain activities, even if they have been illegal for centuries. All of these activities have become increasingly common in the last few decades as successive governments have attempted to modernise the law by “respecting human rights” whilst “getting tough on law and order”.

## 22 CATEGORIES OF CRIME

- 22.1 Although some crimes are not easily categorised, most fit within a few broad categories, often with related prohibited acts (*actus reus*) and prohibited motives (*mens rea*).

### Offences Against the Person

Murder  
Manslaughter  
Assault  
Rape and other Sexual Offences  
Kidnapping  
Slavery

### Financial Offences

Fraud  
Insider Dealing

### Drug Offences

Possession  
Trading  
Smuggling

### Offences Against Property

Theft  
Burglary  
Robbery  
Criminal Damage  
Piracy  
Taking Without Consent

### Public Order Offences

Riot  
Affray

### Electronic Offences

Phone Hacking  
Malicious Communications  
Child Pornography  
Online Grooming



## 23 THE POLICE AND THE CROWN PROSECUTION SERVICE

### Investigation of Crime

- 23.1 The police investigate suspected crimes, gathering evidence and conducting interviews until they feel they have a strong enough case to charge someone with the offence. Their conduct in this is largely governed by the **Police and Criminal Evidence Act 1984**, which covers such matters as:

- stop and search;
- seizure of property;
- arrest and detention; and
- dealing with suspects.

### Bringing the Case to Court: The Crown Prosecution Service

- 23.2 It used to be the case that having decided that the suspect should be charged, the police would pursue the case themselves, but a Royal Commission on Criminal Procedure, which published its results in 1981, had the following three main criticisms of the Criminal Justice system in England and Wales:
- The police should not investigate offences *and* decide whether to prosecute. The officer who investigated a case could not be relied on to make a fair decision whether to prosecute;
  - Different police forces around the country used different standards to decide whether to prosecute;
  - The police were allowing too many weak cases to come to court. This led to a high percentage of judge-directed acquittals.
- 23.3 Under the Prosecution of Offences Act 1985, a body called the Crown Prosecution Service (CPS) was created, and since 1986, the final decision on whether to pursue a criminal case is made not by the police, but by this organisation. The CPS is headed by the Director of Public Prosecutions (currently Max Hill QC) and staffed by qualified lawyers who can make an informed decision about the legal viability of the cases presented to them by the police. If the case is approved, the CPS themselves will then prepare and prosecute it in court.
- 23.4 The Director of Public Prosecutions operates under the superintendence of the Attorney General – the legal adviser to the government – who is accountable to Parliament for the CPS. The Director is supported by a Chief Executive, who is responsible for running the business on a day-to-day basis, allowing the Director to concentrate on prosecution, legal issues and criminal justice policy.
- 23.5 The CPS is divided into 13 geographical Areas across England and Wales. Each Area is led by a Chief Crown Prosecutor (CCP) who is responsible for the provision of a high quality prosecution service in their Area. Each CCP is supported by an Area Business Manager (ABM), and their respective roles mirror, at a local level, the responsibilities of the DPP and Chief Executive. Administrative support to Areas is provided by Area Operations Centres. A 'virtual' 14th Area, CPS Direct, is also headed by a CCP and provides out-of-hours charging decisions to the police.

- 23.6 Two specialist casework groups - Central Fraud Group and Serious Crime Group - deal with the prosecution of all cases investigated by the Serious & Organised Crime Agency, UK Borders Agency and Her Majesty's Revenue & Customs as well as serious crime, terrorism, fraud and other challenging cases that require specialist experience.
- 23.7 The CPS is effectively the largest law firm in the UK, dealing exclusively with criminal cases and casework issues arising from them. It employs over 8,000 people. About 35% are qualified prosecutors and more than 93% of all staff are engaged in, or support, frontline prosecutions.

## **24 THE MAGISTRATES' COURTS**

### **The Magistrates**

- 24.1 There are about 330 magistrates' courts throughout England and Wales. Most magistrates (about 16,000) are laymen and women who sit in twos or threes, advised on the law by 'legal advisors' (formally known as 'clerks'). One of the magistrates will act as the chairperson, and is called the 'Presiding Justice'.
- 24.2 In a few courts there are legally qualified (and salaried) district judges (formally known as 'stipendiary magistrates') who sit alone. There are about 140 district judges and 170 deputy district judges.<sup>19</sup>
- 24.3 Lay magistrates (known as Justices of the Peace) are volunteers from the local community who do not require any formal legal training, but who undertake a training programme to develop the necessary skills.

### **Jurisdiction of the Magistrates' Court**

- 24.4 All criminal cases (nearly 2,000,000 a year) begin in a magistrates' court, though serious ones are sent (committed) to the Crown Court for the trial itself. About 97% of criminal cases are heard by the magistrates.

### **Summary Offences**

- 24.5 If the offence is a minor one, the magistrates will try it. Examples are driving without insurance, parking offences and using abusive behaviour. The number of summary offences has recently been increased to include most motoring offences, minor criminal damage and assaulting a police officer.

### **Indictable Offences**

- 24.6 If the offence is a serious one, the magistrates will commit it to the Crown Court for trial by jury. (Committal proceedings nowadays are usually just a matter of paperwork.) Examples are murder and rape. The magistrates will generally decide whether to grant bail and deal with other legal issues such as reporting restrictions before passing the case to the Crown Court.

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<sup>19</sup> [www.judiciary.uk](http://www.judiciary.uk) gives the latest statistics.

## **Hybrid/ Triable Either Way Offences**

- 24.7 A middle-range offence may be tried by the magistrates if they wish to try it and the accused agrees. Otherwise it will go to the Crown Court.
- 24.8 In 2000, the government attempted to introduce legislation to abolish the defendant's right to choose to be tried in the Crown Court, leaving it up to the magistrates alone to decide. This was designed to save money by having more cases tried by the magistrates, and to prevent rogues from using the Crown Court procedure as a delaying tactic. However, it was seen by many as a serious breach of civil liberties and was rejected by the House of Lords. Instead, various tinkering has taken place under the Criminal Justice Act 2003.
- 24.9 In particular:
- A trial judge may sit without a jury in the Crown Court if there is a serious risk of jury tampering;
  - If the magistrates decide to hear a hybrid offence themselves, the defendant has the right to ask for an indication of the likely sentence on a plea of guilty before deciding whether to go to the Crown Court.

## **Sentencing**

- 24.10 Lay magistrates may not usually impose a sentence of more than 6 months imprisonment for a single offence, and 12 months in total, or an unlimited fine (subject to any statutory maximum, which is typically £5,000). If they think that the offence merits a greater punishment, they must send the convict to the Crown Court for sentencing. They must also do this if they think that youth custody is appropriate.
- 24.11 Other possible sentences include Community Payback orders and probation orders.

## **Youth Court**

- 24.12 If the accused is under 18, the magistrates sit as a Youth Court. There must be three magistrates sitting, not all of the same sex, and they must have had special training. The court sits in a different room to that used for normal trials and the hearings are in private. Defendants under the age of 18 are dealt with here unless they have been charged with homicide or some other very serious offence.

## **Proposed Reforms**

- 24.13 There is a proposal to reduce the work of the magistrates' courts by abolishing the need for a court hearing at all in minor cases where the defendant pleads guilty. The sentence would be determined by the prosecutor in consultation with the police. Offences involved are likely to include writing graffiti.

## **Appeals from the Magistrates' Court**

### **24.14 The Crown Court**

Appeal from the Magistrates' Court is usually to the Crown Court. Only the accused may appeal to the Crown Court, but there is the risk that the Crown Court may actually increase a sentence rather than reduce it. (The Crown Court can only give a sentence up to the Magistrates' Court maximum in such cases.)

## 24.15 The Divisional Court

Appeals may also be made by way of Case Stated on matters of pure law to the Divisional Court of the Queen's Bench. The Divisional Court may reverse, affirm or amend the decision of the magistrates. If the prosecution has appealed, the Divisional Court may send the case back to the magistrates with instructions to them to convict and sentence the accused, or they may just do it themselves.<sup>20</sup>

### Civil Jurisdiction of the Magistrates' Courts

- 24.16 Although the Magistrates' Courts are primarily concerned with criminal matters, they do have a significant civil jurisdiction.

## 25 THE CROWN COURT

### Jurisdiction of the Crown Court

- 25.1 The Crown Court is, in theory, a single court, but, in fact, comprises about 77 local court centres in large towns. There are three tiers of Crown Court centre, based on the type of work they deal with.
- 25.2 The Crown Court tries all indictable offences with a jury of twelve lay-people. The jury decide solely on questions of fact, whilst the judge rules on questions of law.
- 25.3 The Crown Court also hears appeals from Magistrates' Courts. Some courts deal with more serious offences than others, depending on the seniority of the judge in charge. For less serious (class 4) offences, magistrates may sit with the judge. Appeal from the Crown Court is to the Court of Appeal (Criminal Division).

### Civil Jurisdiction of the Crown Court

- 25.4 The Crown Court is principally a criminal court, but it does have some civil jurisdiction. See para 36.28 below.

### Judges of the Crown Court

- 25.5 Cases may be presided over by judges of varying degrees of seniority<sup>21</sup>. From the highest to the lowest, they are:
- i) **A High Court Judge:** Ordinary High Court judges are known as *puisne judges* (pronounced *punny*) which means junior. (They are actually rather senior judges. They are only 'puisne' compared to the other senior judges.) All High Court judges are knighted (or made a Dame), but they are called 'My Lord' or 'My Lady' in court. Their names are abbreviated to Barrie J., and they are referred to as Mr (or Mrs) Justice Barrie. They will hear 'class 1' offences, including treason and murder.
  - ii) **A Circuit Judge/ Deputy Circuit Judge:** Circuit judges are called 'Your Honour' in criminal courts, unless they are sitting at the Central Criminal Court in London, when they are called 'My Lord/Lady. They are referred to as 'His (Her) Honour Judge Barrie' abbreviated in writing to HHJ Barrie. They will hear 'class 2' offences, including rape. They will also try 'class 3' offences, such as burglary, grievous bodily harm and robbery.

<sup>20</sup> This is one of the exceptions to the 'double jeopardy' rule.

<sup>21</sup> <<https://www.judiciary.uk/you-and-the-judiciary/what-do-i-call-judge/>>

- iii) **A Recorder/ Assistant Recorder:** A Recorder is a part-time Circuit Judge, usually a practising barrister or solicitor. Recorders are addressed in court in the same way as Circuit Judges (as 'Your Honour'). There is no formal abbreviation for the position and Recorders are referred to as 'Mr/Mrs Recorder Barrie'. They will normally hear 'class 3' offences.

## **The Jury**

- 25.6 Under the Juries Act 1974 (as amended by the Criminal Justice Act 2003 and the Criminal Justice and Courts Act 2015) anyone aged between 18 to 75 who is on the electoral register and has lived in the UK, Channel Islands or the Isle of Man for at least 5 years since the age of 13, may be required to do jury service, unless disqualified or ineligible.

The following are ineligible to serve/ disqualified from serving on a jury:

- People who are – who are liable to be – detained under the Mental Health Act 1983
  - People who lack capacity to serve as a juror under the Mental Capacity Act 2005
  - People who are on bail in criminal proceedings
  - People who have ever been sentenced to 5 years or more imprisonment
  - People who have ever been sentenced to imprisonment for public protection
  - People who have served or been sentenced to any term of imprisonment within the last 10 years
  - People who have been subject to a community order within the last ten years
- 25.7 You may request a deferral or excusal from jury service, but this is subject to consent being granted. Only one deferral will be granted in any case. Total excusal is very rare and only given in extreme cases.
- 25.8 Prior to 2003, various people, such as lawyers, politicians and vicars had the right to be excused from jury service, but this is no longer the case. The only people who may now be excused as of right are military personnel on essential active service; and people who have served on a jury in the last 2 years.

## **26 THE COURT OF APPEAL (CRIMINAL DIVISION)**

### **Jurisdiction of the Court of Appeal (Criminal Division)**

- 26.1 If a person has been tried on indictment (i.e. in the Crown Court), the Court of Appeal will hear an appeal against a conviction or sentence. It will not normally hear an appeal from the prosecution (but n.b. the Double Jeopardy Rule discussed below.)

The Lord Chief Justice, the Lord and Lady Justices of Appeal and High Court judges sit, as requested, in threes.

Appeals on points of pure law do not require permission, but where questions of pure fact are concerned, permission is required either from the trial judge or from the Court of Appeal itself. It may also review a case or consider a point of law on the request of the Attorney-General.

## **The Double Jeopardy Rule**

- 26.2 The Double Jeopardy Rule – that no-one could be tried for the same offence twice – has been part of the Common Law since Norman times, subject to only three exceptions:
- The prosecution has a right of appeal against acquittal in summary cases if the decision appears to be wrong in law or in excess of jurisdiction.
  - A retrial is permissible if the interests of justice so require, following appeal against conviction by a defendant.
  - A "tainted acquittal", where there has been an offence of interference with, or intimidation of, a juror or witness, can be challenged in the High Court.
- 26.3 However, following the murder of Stephen Lawrence in 1993 – where the trial collapsed through lack of viable evidence collected in a botched police investigation - the Macpherson Report suggested that double jeopardy should be abrogated in serious cases where "fresh and viable" new evidence came to light. The law was accordingly changed by the Criminal Justice Act 2003. Retrials are now allowed if there is new and compelling evidence for certain serious crimes, such as murder, rape and armed robbery. All such retrials must be approved by the Director of Public Prosecutions.
- 26.4 The Act has been applied in several cases, most notably in the retrial of the murderers of Stephen Lawrence himself, who were finally convicted on January 3rd 2012.

## **27 THE SUPREME COURT (FORMERLY THE HOUSE OF LORDS)**

### **Jurisdiction of the Supreme Court**

- 27.1 The Supreme Court hears appeals if a relevant order has been made in the court below (usually the Court of Appeal). Such an order will only be made if the case involves a point of law of general public importance. If (but only if) the court below has refused to grant permission to appeal, a panel of the Supreme Court will consider a direct application, subject to the Supreme Court Rules 2009.<sup>22</sup>
- 27.2 Either the prosecution or the defence may launch such an appeal. The Supreme Court may also hear appeals from the Divisional Court of the Queen's Bench Division.
- 27.3 If the case in the original court involves a point of particular legal interest, the trial judge may send the case directly to the Supreme Court, thereby leap-frogging the Court of Appeal. Both parties to the dispute must consent to this.
- 27.4 Appeals from the Court of Appeal are heard by three, five, seven, nine or eleven Justices, who give their decisions as written speeches. (Five is the most common.) The majority view prevails and their decisions set binding precedents on all lower courts.

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<sup>22</sup> SI 2009 No. 1603 (L.17)

## Justices of the Supreme Court

- 27.5 The final appeal hearings and judgments of the House of Lords took place on 30 July 2009. The judicial role of the House of Lords as the highest appeal court in the UK was then ended after 800 years. From 1 October 2009, the Supreme Court<sup>23</sup> of the United Kingdom assumed jurisdiction on points of law for all civil law cases in the UK and all criminal cases in England, Wales and Northern Ireland
- 27.6 The head of the Supreme Court is called 'The President' but until October 2005 the head of the House of Lords was the Lord Chancellor, and between then and October 2009 it was the Lord Chief Justice. The current President is Lord Robert Reed, who is also President of the London Metropolitan University Mansfield Student Law Society!
- 27.7 The members of the Appellate Committee of the House of Lords were appointed specifically to sit as 'Law Lords' and were known as 'Lords of Appeal in Ordinary'. There were usually twelve such Law Lords at a time. They were normally referred to by their simple title - *Lord (Lady) Barrie* - though their self-selected geographical designation was sometimes included – *Lord Barrie of Manchester-on-the-Canal*.
- 27.8 An objection to the Appellate Committee was that all the members of it become Life Peers (if they were not already Lords) and so could sit in Parliament, thus combining the functions of legislator and judiciary. In recent years judges became increasingly active on politically and socially sensitive issues, and critics said that they should be removed from the political arena. The new 'Supreme Court' does not have that problem. The Lords of Appeal in Ordinary became the first Justices of the 12-member Supreme Court, but they were disqualified from sitting or voting in the House of Lords until they retired. Newly-appointed Justices of the Supreme Court do not have automatic seats in the House of Lords at all.

## 28 APPEALS BY WAY OF CASE STATED

- 28.1 Where a point of pure law is concerned, an appeal may be made by either side in a Magistrates' Court trial, to the Divisional Court of the Queen's Bench Division. If the court gives a decision on law contrary to the finding in the Magistrates' Court, it may remit the case for retrial on the basis of the new ruling of law.
- 28.2 Usually two High Court judges will sit in a Divisional Court, though there may sometimes be three. Their decisions on points of law set a binding precedent for the lower courts.
- 28.3 Judges of the Court of Appeal may sit in the High Court when it is exercising its appellate and supervisory jurisdictions.

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<sup>23</sup> This terminology is rather confusing, as the expression 'Supreme Court' was previously used to describe the High Court, Crown Court and Court of Appeal, but NOT the House of Lords!

## 29 ELEMENTS OF CRIMINAL PROCEDURE

### Introduction

- 29.1 There have been a considerable number of reforms in criminal litigation procedure over the last 20 years starting with the partial abolition of the right to silence introduced by the *Criminal Justice and Public Order Act 1994*, the new obligations upon the parties in respect of service of a defence and disclosure under the *Criminal Procedure & Investigations Act 1996* and many more recent reforms, notably the *Criminal Justice Act 2003*, which has made enormous changes to police powers, defendants' rights, double jeopardy and sentencing.
- 29.2 The detail of the rules may now be found in the **Criminal Procedure Rules 2020**.

### The Presumption of Innocence

- 29.3 The prosecution must discharge the legal burden of proof to show that the defendant is guilty 'beyond all reasonable doubt'.
- 29.4 A legal burden of proof may be imposed upon the defence under statute.

#### ***Woolmington v. DPP [1935] AC 462***

*"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity which has to be proven by the defendant [on a balance of probabilities] and subject also to any statutory exception."* per Viscount Sankey

### The Adversarial System

- 29.5 The basic premise of the adversarial system is that the prosecution and the defendant are each represented by independent lawyers, who present their cases to an independent and impartial judge.
- 29.6 The accused is not required to give evidence, though they may be cross-examined on it if they do so. Although the judge or jury might draw negative inferences from the defendant's refusal to give evidence, their counsel might decide that this is a better tactic than to permit the cross-examination by a skilled opposition barrister. Thus a case may be decided on the skill of the barristers rather than the merits of the case.
- 29.7 Furthermore, there are strict rules as to what evidence may be admitted into court. For example, hearsay evidence is not usually allowed as it is likely to be at best inaccurate and at worst misleading and unfairly prejudicial.
- 29.8 This contrasts with the inquisitorial system used in Civil Law jurisdictions, where the defendants can be compelled to give evidence on questioning by the judge, but this is not subject to cross-examination.



## The Trial

29.9 This key elements of a criminal trial are as follows.

- i) **Prosecution opening speech:** The prosecutor outlines the case against the defendant and sets out the evidence that will be called during the trial.
- ii) **Prosecution witnesses: Examination in Chief:** The witnesses are sworn to tell the truth, either on an appropriate religious book (such as the Bible), or by affirmation. Lying on oath is the criminal offence of perjury. The first prosecution witness is usually the arresting officer who will be called to testify when, where and why they arrested the defendant at such and such a time and place, for whatever offence. Other witnesses relevant to the case will then be examined. There are certain Rules of Evidence which apply to the examination-in-chief, such as the hearsay rule and the prohibition on leading questions.
- iii) **Cross-examination of prosecution witnesses:** After being questioned by the prosecution, the prosecution witnesses can then be cross-examined by the defence.
- iv) **Prosecution re-examination of its witnesses:** The prosecution at this point has a chance to clarify any points with its witnesses which may have arisen as a result of the defence questioning. The magistrates or judge are also entitled to ask questions to clarify any points which are not clear.
- v) **Submission of no case to answer:** This is optional, but at this point any or all of the defendants have the chance to make a submission that there is no case to answer – ie that the prosecution has failed to produce enough evidence to prove their case. If the magistrates or judge agree to this, the case will be dismissed and the defendant can ask for costs. This is very rare!
- vi) **Defence opening speech<sup>24</sup>:** The defence does not normally make an opening speech, though they can do so with permission from the court.
- vii) **Defence witnesses:** The procedure as described above for the prosecution witnesses is then applied to the defence. Note that the defendants themselves do not have to give evidence but if they do not, the court will warn them that it can take into account the failure to do so when it comes to make a decision on guilt or innocence.
- viii) **Witnesses to fact:** The witnesses to fact are not allowed in the courtroom before their evidence is heard. If they are in court during the early part of the trial, they will not be allowed to testify. They cannot be asked leading questions (that is, questions which suggest the answer, such as: "Isn't it true that you saw the defendant hit the victim with an axe?").
- ix) **Expert witnesses:** These are people who are experts in their field (such as forensic science)/ Unlike witnesses to fact, who are allowed only to say what they saw or heard etc., expert witnesses are allowed to state their opinion on the issue. The other side often objects to expert witnesses. If counsel are calling experts, they must give the opposition a statement from them, outlining what they are going to say at least a week before the trial.

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<sup>24</sup> **McKenzie friends:** An unrepresented defendant has the right to have a 'McKenzie friend' in court with him or her. This person can sit with the defendant, take notes, and offer quiet suggestions, but is not allowed to address the court. This right was established in the Court of Appeal case of *McKenzie v. McKenzie* [1970] 3 WLR 472.

- x) **Character witnesses:** These may be called by the defence, and are usually the last to be called. Basically their function is to say what a good upstanding member of the community the defendant is. However, if the defence produces a character witness, the prosecution then has the right to impugn the defendant's supposed good character by raising any previous convictions they might have - which otherwise cannot usually be mentioned until there has been a conviction. Thus, for those with criminal records, character witnesses are usually best avoided.
- xi) **Section 9 statements:** If any of the witnesses cannot come to court in person, the parties can submit a 'section 9' statement from them (a deposition) to be read out in court. However, a section 9 statement can only be read with the consent of the other side, who may well not agree as it means they do not have the chance to cross-examine the witness.
- xii) **Defence closing speech:** This is the chance for the defence to sum up the legal or moral elements of the defence, to highlight the evidence pointing to innocence, and to invite the magistrates or jury to acquit.
- xiii) **The decision:** The magistrates may retire to make their decision: a jury must do so. If convicted, and before sentencing, the defence should be given the chance to make a statement of mitigation – i.e. to tell the court why the defendant should be treated leniently.
- xiv) **Sentencing:** Before each defendant is sentenced, the prosecution will read out their previous convictions. These may affect the sentence imposed so in a joint trial people may well end up with different sentences for the same offence. Courts are required to give credit for a plea of guilty entered at the earliest opportunity (ie at the first hearing), and this should be reflected by a reduction of any fine or sentence by up to a third.

## Criminal Sanctions

29.10 The range of criminal sanctions are quite different from those obtainable through the civil courts and include: custodial, suspended custodial, intermittent custody, community sentences (or community punishment orders); probation (or community rehabilitation orders); combination orders (or community punishment and rehabilitation orders); fines; absolute/conditional discharges; binding over to keep the peace; care/supervision orders; disqualification; compensation; orders in relation to the mentally ill.

29.11 Commonly used sentencing options, in increasing order of severity, include:

- i) **Absolute discharge:** This is a conviction, but the magistrates decide to take no further action. It basically means that the court has found you are technically guilty but that there is no moral culpability.
- ii) **Conditional discharge:** Given for a set period of up to two years. If the defendant is convicted of another offence within the period of the conditional discharge, he will be in breach of it and could be given a further sentence for the first offence at the same time as being sentenced for the second one.
- iii) **Fine:** Used in 80% of magistrates' court convictions. The amount should be linked to ability to pay, but often defendants are all given the same regardless of their income.

- iv) **Community service:** The court can sentence the defendant to between 40 and 240 hours. If the defendant does not consent to it, he may well get prison instead. Before the court can impose a community service order they must obtain a pre-sentence report. This may require an adjournment.
- v) **Electronic tagging:** This was only brought in as a sentencing option at the end of 1999 and the proposals have not been fully implemented yet.
- vi) **Prison:** Immediate imprisonment is uncommon for minor political offences, unless the defendant has a number of previous convictions. Courts should not sentence someone to prison who has not already served a sentence unless they are 'of the opinion that no other method of dealing with him is appropriate'. In addition, courts should not pass a sentence of imprisonment on someone who has not previously been to prison unless they are legally represented, but this condition can be waived if the defendant has refused legal representation. They should also not sentence anyone to prison without a pre-sentencing report unless they have previously served a prison sentence, although this will be waived if the defendant refuses to co-operate with it.

The maximum sentence a magistrates' court can impose is six months for one offence and twelve months for two or more offences (but note again that magistrates may send a convicted defendant to Crown Court for sentencing if they feel that this is insufficient and the offence carries a possible sentence greater than six months).

- vii) **Court costs and compensation:** Whatever the sentence, the defendant will usually be ordered to pay court costs. On a guilty plea the usual figure is around £50. For a trial lasting a day in the magistrates court the costs could be between £100 and £200. The defendant may also be ordered to pay compensation if you've been convicted of criminal damage or assault. Both costs and compensation are pursued in the same way as fines.

# PART 4: CIVIL LAW AND PROCEDURE

## 30 INTRODUCTION

- 30.1 Anything that is not **Criminal Law** is called **Civil Law**. Consequently, Civil Law is a much wider category, and the vast majority of law and legal practice concern 'civil' matters.<sup>25</sup>
- 30.2 Much Civil Law is non-contentious – e.g. drafting wills, forming companies, conveying land, drafting contracts etc.
- 30.3 Civil wrongs are matters relating to individuals for which the law is prepared to grant a remedy if one is sought by the aggrieved party. Although the Civil Law – like the Criminal Law – is based on judicial precedent and statute, it is much more flexible than the Criminal Law.

## 31 CATEGORIES OF CIVIL LAW

- 31.1 There are numerous categories of civil law, but some of the most commonly litigated are:

### **The Law of Contract**

- Commercial Law
- Consumer Law

### **The Law of Tort**

- Negligence
- Occupiers' Liability
- Trespass to Land
- Assault and Battery
- Conversion of Goods
- Defamation
- Private Nuisance

### **The Law of Equity and Trusts**

- Wills
- Settlements
- Breach of Trust

### **Public Law**

- Judicial Review of the actions of public bodies

### **Family Law**

- Divorce
- Custody of Children
- Maintenance Orders

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<sup>25</sup> The term 'Civil Law' is also used to describe legal systems based on the codified Roman Law system: These include most of the states of Western Europe. Systems based on the English Legal System of judicial precedent are collectively called 'common law' systems. These include Australia, New Zealand and the USA. The term 'Civil Law' also distinguishes general law from Military and Canon Law.

## 32 CIVIL LITIGATION: Introduction

### Out-Of-Court Settlements

- 32.1 Most civil disputes concern a breach of contract or a debt and are settled by the parties without resort to the court system at all, though sometimes a stern letter threatening court action is needed to convince a reluctant debtor to pay!

### Alternative Dispute Resolution

- 32.2 It is greatly encouraged that parties should avoid the courts with ADR. These are discussed in more detail in below. The two key methods are:

- i) **Mediation and Conciliation:** A third party is brought in to mediate between the disputants. The mediator will read and hear a version of the case from both parties, discuss it with them, and then attempt to move them towards a constructive solution. All small claims (normally under £10,000) are now immediately referred to a mediator, although it is not mandatory to use the service.
- ii) **Arbitration:** The disputants may agree, or have agreed in their contract, to accept as binding the decision of an independent third party (other than a judge). Thus their dispute can be settled more quickly, informally and usually more cheaply than would be the case if they went to court. Arbitration is regulated by the Arbitration Act 1996.<sup>26</sup>

- 32.3 Other systems whereby the parties may be assisted in reaching an out-of-court agreement include:

- i) **Mini-Trial:** A tribunal where the parties have neutral, independent representatives with the authority to reach a compromise. This is also called 'structured settlement procedure'.
- ii) **Expert or Judicial Appraisal:** Experts in the relevant field or the law give guidance. The Centre for Dispute Resolution may recommend former judges and senior counsel to assist in the latter.

### Going to Court

- 32.4 If out-of-court methods do not work, the aggrieved party may want to sue the other for a remedy. Whether he does this in the County Court or the High Court or in front of a Tribunal will depend on the nature of the case – especially the amount being claimed.
- 32.5 The current system of civil courts was introduced by the Judicature Acts 1873-1875, replacing the many separate courts by the Supreme Court<sup>27</sup> of Judicature (now called 'The Senior Courts of England and Wales') divided into the Court of Appeal, the High Court of Justice and, since 1972, the Crown Court.
- 32.6 The civil court system has been reformed by various statutes including the County Courts Act 1984 and the Courts and Legal Services Act 1990.

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<sup>26</sup> There is a view that arbitration should not be regarded as ADR, as it is, in effect, a trial, whereas mediation and conciliation involve the parties settling their differences by mutual consent.

<sup>27</sup> The term 'Supreme Court' now refers to the former House of Lords Judicial Committee, which was not part of the old Supreme Court of Judicature!

- 32.7 Further reforms to civil procedure were made on April 26 1999 when the Civil Procedure Rules 1998 came into force, following the recommendations of Lord Woolf's *Report on Access to Justice*.

### **33 CIVIL LITIGATION: Alternative Dispute Resolution**

- 33.1 In the 1995 report on civil reform, Access to Justice, Lord Woolf said:

"ADR [Alternative Dispute Resolution] has the obvious advantages of saving scarce judicial and other resources. More significantly...it offers a variety of benefits to litigants. ADR is usually cheaper than litigation, and often produces quicker results. In some cases, parties will want to avoid the publicity associated with court proceedings. It may also be beneficial for them...to choose a form of dispute resolution which will enable them to work out a mutually acceptable solution..."

- 33.2 Most commentators agree that there is no one exclusive type or method of ADR. Indeed, sometimes tribunals (such as rent tribunals or social security tribunals) are labelled as forms of ADR, because (usually) they satisfy the requirement of a quicker solution than litigation and in theory are more "user friendly" to members of the public than the courts.
- 33.3 Some commentators clearly think of ADR as involving either arbitration (common in maritime and international trade disputes) or a process of mediation/conciliation. We can see this in Amrapali Choudhury's article: "What the User Wants and Needs out of ADR" (based on a paper delivered to the Conference on Trend Spotting in European Dispute Resolution, held by the European Branch of the Chartered Institute of Arbitrators at Trinity Hall, Cambridge on 6 to 8 July 2001: (2001) Arbitration 317). The author deals with the issue of GAFTA's (the Grain and Feed Trade Association: see Module 2) arbitration services, saying that all GAFTA sale contracts have a GAFTA arbitration clause which stipulates that, in the event of a dispute, the matter will be referred to by resorting either to GAFTA Arbitration under Rule 125 or the Simple Dispute procedure under Rule 126. These arbitration services are referred to as being part of GAFTA's alternative dispute resolution services.
- 33.4 However, the author goes on to point out that, in addition to arbitration services, GAFTA also provides mediation, under the Mediation rule, Rule 128, which came into effect in 2001. (If the mediation is unsuccessful and the parties cannot agree to a settlement, the claimant may then revert to GAFTA Arbitration Rule 125.) It is quite clear that the author views both the arbitration and mediation services as being ADR.
- 33.5 Nonetheless, it is more usual to think of arbitration and ADR as being different processes. Roy Goode has certainly taken this approach in *Commercial Law in the Next Millennium* (Sweet & Maxwell, 1998). He appears to draw a distinction between arbitration and ADR when he makes the suggestion that "much commercial arbitration has become almost indistinguishable from litigation" and that "there is so much dissatisfaction with arbitration and a growing trend towards alternative dispute resolution methods, such as mediation and the mini-trial."

## **34 CIVIL LITIGATION: Arbitration**

### **Introduction**

- 34.1 In recent years, arbitration has been the subject of comprehensive reform. The law on arbitration is now contained in the Arbitration Act 1996. This came into force on 31 January 1997. The opportunity was taken to draw together many sources of arbitration law and the Act brings together previous legislation on arbitration and principles which have been established in recent cases.
- 34.2 The Act is intended to increase the effectiveness and thus the attractiveness of arbitration as a method of settling disputes without recourse to the courts. The Act follows the spirit of the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Law on 21 June 1985).

### **What is Arbitration?**

- 34.3 Section 6 of the Arbitration Act 1996 states: “In this Part ‘Arbitration Agreement’ means an agreement to submit to arbitration present or future disputes (whether they are contractual or not)”. The word “disputes” is, therefore, given a very wide meaning. Disputes might involve claims in contract, tort, breach of statutory duty, or even claims based upon fraud. The general principles of the Act, and the direction an arbitration hearing is likely to take, can be found in section 1 of the Act.
- 34.4 In summary, this makes three key points:
- the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense;
  - parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
  - in disputes to which the Arbitration Act 1996 applies, the courts should not intervene, except as provided by the Act.

### **Arbitration Procedure**

- 34.5 An arbitration hearing will be conducted in a manner suited to the particular nature of the dispute. The procedure can be based upon that adopted in the courtroom, but this is not essential. The overriding requirement is that the procedure should be fair. In deciding how to conduct the proceedings, the arbitrator will consider all the facts of the dispute, including the value of the claims involved.

### **Duties of Parties Agreeing to Arbitration**

- 34.6 In keeping with the idea of fairness, and the objective of dealing with disputes as swiftly and economically as possible, section 40 of the Act requires the parties involved in an arbitration to do “everything necessary for the proper and expeditious conduct of the proceedings”.

## Who Can Act as an Arbitrator?

- 34.7 An arbitration hearing may be chaired (or “judged”) either by a single arbitrator or a tribunal. The parties involved can agree upon who is to act as arbitrator, or who is to make up a tribunal. Sections 14, 15 and 16 of the Arbitration Act deal with the selection and appointment of arbitrators. Generally, the selection of arbitrator will be based upon their knowledge, experience and expertise in a certain field (e.g. international trade or maritime collisions).

## The Powers of an Arbitrator

- 34.8 Under section 34 of the Act, the arbitrator or tribunal hearing the arbitration has the power to make decisions relating to procedural and evidential matters if the parties themselves cannot reach agreement on these matters. This can include the location and date of the arbitration, and what language/s it shall be conducted in (which allows for a hearing to be conducted outside the UK if appropriate). Decisions on matters of evidence and procedure might include whether to apply the strict rules of evidence used in a court, the form that any evidence will take (oral, written deposition) and the degree to which witnesses may be cross-examined.
- 34.9 A more radical aspect of arbitration is that the arbitrator or tribunal can take it upon themselves to decide the extent to which they will take the initiative in ascertaining facts and law – thus, the proceedings may be “inquisitorial”, in contrast to the “adversarial” nature of proceedings in an English court. (The full range of powers available to arbitrators/tribunals can be found in sections 38 to 44 of the Arbitration Act.)

## Types of Arbitration Rules and the Curial Law

- 34.10 The parties may have adopted an international code of arbitration, such as the UNCITRAL Arbitration Rules, or the Rules of Arbitration of the International Chamber of Commerce (ICC). They may have contracted on standard form contract such as a GAFTA contract which will provide for arbitration under the Association’s procedures. The parties may, however, simply have agreed that any dispute shall be determined by arbitration. In such a case reference must be made to the national legal system applicable to the arbitration procedure: in English law this will be the Arbitration Act 1996.
- 34.11 The law applicable to the arbitration procedure (sometimes referred to as the curial law) may be different from the law governing the contract. For example, in *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583, in which the law governing the contract was English law, the parties held their arbitration in Scotland in accordance with the Scots law applicable to arbitration. The House of Lords held that Scots law regulated the arbitration procedure, whilst the arbitrator had to apply English law as the law governing the contract itself.



## 35 CIVIL LITIGATION: Mediation and Conciliation

- 35.1 The main difference between arbitration and ADR or mediation is that ADR and mediation are processes by which the parties, with the help of an independent third party, find their own solution to their dispute.
- 35.2 The ADR/mediation procedure does not result in a judgment or decision from a third party such as a judge or arbitrator. Rather, the parties agree between themselves what the outcome will be. This may not be the outcome one party had hoped for, but it is the outcome that he will settle for in order to avoid the time and expense of a court hearing or an arbitration. While the emphasis is on the parties themselves reaching agreement, a professional mediator can play a vital role in helping the parties to compromise.

## 36 CIVIL LITIGATION: Going to Court

### The County Court

- 36.1 The County Court system dates back to the County Courts Act 1846, which created 60 circuits within England and Wales, and 491 courts within these circuits. This system was abolished in 1970, and since the Crime and Courts Act 2013, the County Court is technically a single entity which sits simultaneously in many different places. As such, the correct way to refer to a County Court centre is as (for example) 'the County Court at Accrington' rather than 'Accrington County Court'. There are about 170 centres.

### Judges of the County Court

- 36.2 There are three types of judge attached to the County Court.
- i) **The Circuit Judge** is a senior judge who hears cases of particular complexity, especially those worth over £15,000. Circuit judges are appointed to one of seven regions of England and Wales, and sit in the Crown Court and County Court within their particular region.
- A Circuit Judge called Barrie should be referred to as *HHJ Barrie (His or Her Honour Judge...)*
- ii) **The District Judge** (formally known as the Registrar) hears many less important cases – which is most of them. They are assigned on appointment to a particular circuit and may sit at any of the County Courts or District Registries of the High Court on that circuit.
- A District Judge called Barrie should be referred to as *Mr (or Mrs) District Judge Barrie*.
- iii) **Fee Paid Judges:** Various non-salaried judges sit occasionally in the County Court, such as Deputy District Judges, Deputy Circuit Judges and Recorders.

## Jurisdiction of the County Court

- 36.3 i) **Contract and Tort:** The County Court has unlimited jurisdiction in contract and tort cases, and claims for less than £100,000 must be brought in the County Court, rather than in the High Court. If the claim is for more than £100,000, the case may be brought in the High Court if this can be justified by the complexity or importance of the case.
- ii) **Equity:** In cases involving contested probate actions, the County Court has jurisdiction where the trust fund is worth no more than £30,000; and in general equity matters, the limit is £350,000.<sup>28</sup>
- 36.4 Although the jurisdiction of the County Court is almost entirely at first instance, there is some limited appellate jurisdiction in relation to decisions taken by local authorities in relation to homelessness.

## Litigation Tracks in the County Court

- 36.5 Depending on the nature and value of the claim, there may be one of three 'tracks' allocated.
- i) **The Small Claims Track**  
Where a claim is for less than £10,000 it may usually be heard quickly and cheaply by the District Judge in an informal "small claims arbitration." This is normally done in a private room (chambers) with no legal representatives. It is particularly suitable for small consumer complaints where the legal issues are not complex. Personal injury claims for over £1,000 (not including consequential loss) cannot use this procedure.
- The cost of bringing an action varies from £35 to £455, depending on the amount claimed.<sup>29</sup>
- ii) **The Fast Track**  
Where the claim is not suitable for the small claims track, but the amount claimed is less £25,000 and the court considers that the case is unlikely to last more than one day, the case will be allocated to the 'fast-track'. This involves the judge setting the parties a strict timetable for proceeding with the case (delivering documents, exchanging claims etc.) with penalties for those who do not comply with the timetable. This is designed to make relatively small claims quicker (and therefore cheaper) to pursue.
- iii) **The Multi-Track**  
Any claims that do not fit into either the 'small-claims' track or the 'fast track' will be dealt with under the more complex 'multi-track' system. The procedure in such cases is closely supervised by the judge and tailored to each case

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<sup>28</sup> County Court Act 1984, s.23; County Court Jurisdiction Order 2014.

<sup>29</sup> <<https://www.gov.uk/make-court-claim-for-money/court-fees>>. If the claim is just for an unpaid debt, a claim up to £100,000 can be issued online (for a slightly lower fee than using the paper forms). For information on how to make a money claim online and how the system works in general, go to <<https://www.moneyclaim.gov.uk/web/mcol/welcome>>.

## The High Court

36.6 The High Court is divided into 3 areas of specialism, which are subdivided into specialist courts.

**i) The Queen's Bench Division**

This includes the Divisional Court, the Admiralty Court, the Commercial Court and the Technology and Construction Court. It is by far the largest of the Divisions, and deals with damages in respect of personal injury negligence, breach of contract, and libel and slander (defamation), non-payment of a debt, and possession of land or property.

**ii) The Chancery Division**

This includes the Bankruptcy and Companies Court and the Patents Court. The areas of work that it deals with are: business and property related disputes; competition; patents claims; intellectual property claims; companies claims; insolvency claims; trust claims; probate claims.

**iii) The Family Division**

The Family Division of the High Court has jurisdiction to deal with all matrimonial matters and matters under the Children Act 1989 and the Child Abduction and Custody Act 1985. It also deals with matters relating to Part IV Family Law Act 1996 (Family Homes and Domestic Violence), Adoption and Inheritance Act 1975 applications and Probate and Court of Protection work.

## Judges of the High Court

36.7 The hearing<sup>30</sup> in the High Court is in front of a single judge without a jury (except for some defamation, malicious prosecution and deceit cases in the QBD). Normally only barristers have a right of audience, though under the Courts and Legal Services Act of 1990, solicitors are able to get advocacy certificates to appear in the High Court. High Court Judges (pusine judges) have been discussed above in relation to the Criminal Courts.

36.8 Since October 2005, when certain provisions of the Constitutional Reform Act 2005 came into effect, there has been a change in some of the titles given to the heads of the Divisions of the High Court. This is because the Lord Chancellor, who used to be head of the judiciary, has now ceded that role to the Lord Chief Justice (currently Lord Burnett of Maldon).

36.9 The Division heads now have the following titles:

**i) The Queen's Bench Division**

The head of the Queen's Bench Division (who used to be the Lord Chief Justice) is now known as the President of the Queen's Bench. The current incumbent is Dame Victoria Sharp.

**ii) The Chancery Division**

The head of the Chancery Division used to be the Vice Chancellor, representing the Lord Chancellor. The title is now the Chancellor of the High Court. The current incumbent is Sir Geoffrey Vos L.J.

**iii) The Family Division**

The head of the Family Division is called the President of the Family Division. The current incumbent is Sir Andrew McFarlane L.J.

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<sup>30</sup> Civil court cases should technically be called 'hearings' rather than 'trials', but the latter term is used so often, it has arguably become correct usage.

## **The Divisional Court**

- 36.10 The Divisional Court usually comprises two or more judges sitting together.
- 36.11 The jurisdiction of the Divisional Court of the Queen's Bench Division is principally as a criminal appeals court to hear appeals by way of 'Case Stated'. It used to hear judicial review and *habeus corpus* applications, but the former are now handled by the Administrative Court and the latter by the normal High Court.
- 36.12 The Divisional Court of the Chancery Division deals with appeals in bankruptcy matters from the County Court.
- 36.13 The Divisional Court of the Family Division deals largely with appeals from Magistrates' Courts in matrimonial matters.

## **The Administrative Court: Judicial Review**

- 36.14 Judicial review is the procedure by which the Administrative Court supervises the exercise of public power on the application of an individual. A person who feels that an exercise of such power by a government authority, such as a Minister, the local council or a statutory tribunal, is unlawful, perhaps because it has violated his or her rights or it has acted *ultra vires* its delegated powers, may apply to have it set aside (quashed) and possibly obtain damages. A court may also make mandatory orders or injunctions to compel the authority to do its duty or to stop it from acting illegally.

## **The Court of Appeal (Civil Division)**

- 36.15 Most appeals from the County Court and the High Court are heard by three judges from this court. They rehear the case by reading the transcript and listening to barristers. They may uphold, reverse or alter a decision. Their judgment is binding on lower courts and themselves.

## **Judges of the Court of Appeal (Civil Division)**

- 36.16 The head of the Court of Appeal (Civil Division) is called the Master of the Rolls. This is written as Sir Terence Etherton M.R. The other judges are called Lord (or Lady) Justices of Appeal. This is written as Barrie L.J., whatever the gender. When you are referring to more than one such judge, it is written as Barrie and James L.JJ. The current Master of the Rolls is Sir Terence Etherton.

## **The Supreme Court (formerly the House of Lords)**

- 36.17 The composition and jurisdiction is as for the Criminal Courts. However, in civil matters it is possible for the Supreme Court to permit an appeal to be made directly from the High Court, thus 'leap-frogging' the Court of Appeal. This will be the case where a matter is of significant public importance and is clearly going to reach the Supreme Court anyway.

The President of the Supreme Court is Lord Robert Reed. (He is also the President of the London Metropolitan University Mansfield Law Society!)

## **The Judicial Committee of the Privy Council**

- 36.18 The Judicial Committee of the Privy Council is made up of the same personnel as the Supreme Court and hears appeals from certain Commonwealth countries, Crown dependencies and overseas territories, when leave has been granted by the lower court or by the panel of the PC itself. Such leave will normally be given only on matters of great and general importance or (in criminal cases) where there has been a grave violation of the principles of natural justice.

Technically the Privy Council gives "advice" to the Crown, but as this advice is always taken, its judgments are usually referred to as decisions.

Very few Commonwealth countries still accept the jurisdiction of the Privy Council, but there are several important cases which still affect English law, even though the decisions are only persuasive within the English legal system. The Privy Council also has jurisdiction over various professional disciplinary proceedings, including the Royal College of Veterinary Surgeons.

- 36.19 Commonwealth countries and independent republics which still accept the jurisdiction of the Privy Council include:

- Antigua and Barbuda
- The Bahamas
- British Indian Ocean Territory
- Cook Islands and Niue
- Grenada
- Jamaica
- Kiribati
- Mauritius
- St. Christopher and Nevis
- Saint Lucia
- Saint Vincent and the Grenadines
- Trinidad and Tobago
- Tuvalu

Overseas territories of the United Kingdom from which the Privy Council hears appeals include:

- Anguilla
- Bermuda
- British Antarctic Territory
- British Virgin Islands
- Cayman islands
- Falkland islands
- Gibraltar
- Montserrat
- Pitcairn Islands
- St Helena, Ascension and Tristan da Cunha
- Turks and Caicos Islands

## The Court of Justice of the European Union

- 36.20 The CJEU usually means the European Court of Justice (ECJ). However, the CJEU is actually comprised of three courts: the European Court of Justice, the General Court and the European Civil Service Tribunal. They all serve different purposes.
- 36.21 The CJEU was established in 1952 and sits in Luxembourg. The Court of Justice has 1 judge from each EU country, plus 11 advocates general. The General Court has 2 judges from each EU country.
- **The Court of Justice** deals with requests for preliminary rulings from national courts, certain actions for annulment and appeals.
  - **The General Court** rules on actions for annulment brought by individuals, companies and, in some cases, EU governments. In practice, this means that this court deals mainly with competition law, State aid, trade, agriculture and trade marks.
- 36.22 The function of the CJEU is to interpret EU law to make sure that it is applied in the same way in all EU countries; and to settle legal disputes between national governments and EU institutions. It can also, in certain circumstances, be used by individuals, companies or organisations to take action against an EU institution, if they feel it has somehow infringed their rights.
- 36.23 The CJEU gives rulings on cases brought before it. The most common types of case are:
- **Interpreting the law** (preliminary rulings): National courts of EU countries are required to ensure EU law is properly applied, but courts in different countries might interpret it differently. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law.
  - **Enforcing the law** (infringement proceedings): This type of case is taken against a national government for failing to comply with EU law. It can be started by the European Commission or another EU country. If the country is found to be at fault, it must put things right at once, or risk a second case being brought, which may result in a fine.
  - **Annuling EU legal acts** (actions for annulment): If an EU act is believed to violate EU treaties or fundamental rights, the Court can be asked to annul it – by an EU government, the Council of the EU, the European Commission or (in some cases) the European Parliament. Private individuals can also ask the Court to annul an EU act that directly concerns them.
  - **Ensuring the EU takes action** (actions for failure to act): The Parliament, Council and Commission must make certain decisions under certain circumstances. If they do not comply EU governments, other EU institutions or (under certain conditions) individuals or companies can complain to the Court.
  - **Sanctioning EU institutions** (actions for damages): Any person or company who has had their interests harmed as a result of the action or inaction of the EU or its staff can take action against them through the Court.<sup>31</sup>
- 36.24 Decisions of the Court have taken EU law into new areas, such as company mergers, fundamental rights and the power for the EU to sign international agreement in fields other than trade, such as the environment or transport. It has established significant new principles, such as 'the right to be forgotten' in data protection, it has advanced individual rights significantly, most notably the rights of working women.<sup>32</sup>

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<sup>31</sup> Source <[https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en)>.

<sup>32</sup> Source <<https://ukandeu.ac.uk/explainers/the-court-of-justice/>>.

## The European Court of Human Rights

- 36.25 The European Court of Human Rights is an international court set up in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. Since 1998 it has sat as a full-time court and individuals can apply to it directly. The Court has delivered more than 10,000 judgments. These are binding on the countries concerned and have led governments to alter their legislation and administrative practice in a wide range of areas. The Court's case-law makes the Convention a powerful living instrument for meeting new challenges and consolidating the rule of law and democracy in Europe.
- 36.26 The Court is based in Strasbourg, in the Human Rights Building designed by the British architect Richard Rogers in 1994. From here, the Court monitors respect for the human rights of 800 million Europeans in the 47 Council of Europe member States that have ratified the Convention.

## Magistrates' Courts

- 36.27 Although the Magistrates' Courts are primarily concerned with criminal matters, they do have a significant civil jurisdiction. As a 'Family Proceedings Court' they hear family proceedings under the Domestic Proceedings and Magistrates' Courts Act 1978 and the Children Act 1989. They also deal with many other matters such as adoption proceedings and recovery of charges for essential services. They may also *inter alia* make orders under the Highways Act 1980<sup>33</sup> in respect of the maintenance of highways at public expense.

## The Crown Court

- 36.28 The Crown Court is principally a criminal court, but it does have some civil jurisdiction. As the appeal court for the Magistrates' Court, it will hear both civil and criminal cases. Furthermore, it does have some civil jurisdiction at first instance, for example under the terms of the Highways Act 1980 in regards to disputes as to the state of highways.<sup>34</sup>

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<sup>33</sup> Highways Act 1980, ss 47, 48, 53 and 54.

<sup>34</sup> Highways Act 1980, ss 56.

## **37 CIVIL LITIGATION: Elements of Civil Court Procedure**

### **The Letter of Claim**

- 37.1 Once a solicitor is satisfied that his or her client has a valid claim, s/he will send a letter to the defendant to explain the claim in detail, and to give him a chance to settle the claim before court proceedings are commenced. (If the defendant has a solicitor as well, the letter must be addressed to the solicitor, not to the defendant himself.)
- 37.2 Under the Practice Direction on Pre-action Conduct (which is one of the supplements to the Civil Procedure Rules 1998), there is a detailed list of required inclusions for this letter. These include:
1. The claimant's full name and address;
  2. The basis for the claim;
  3. A summary of the facts on which the case is based;
  4. What the claimant wants from the defendant;
  5. If financial loss is claimed, an explanation of how it is calculated;
  6. A list of the essential documents on which the claimant intends to rely;
  7. Suggestions of any suitable Alternative Dispute Resolution
  8. The date by which the claimant considers it reasonable to receive a full response;
  9. A request for any relevant documents that the defendant might have.
- 37.3 If the defendant has a solicitor, he or she must reply according to the requirements of the Practice Direction. These include:
1. Accepting the claim in whole or in part; or
  2. Stating that the claim is not accepted and why;
  3. If making a counterclaim, write a letter on the same basis as the Letter Before Claim
- 37.4 The exchange of these letters will often lead to negotiations on a 'Without Prejudice' basis, and, hopefully, a resolution of the dispute, usually by a payment.

### **Issuing Court Proceedings**

- 37.5 Court proceedings are commenced by filling out the appropriate form (which can be obtained at any court office or online at <<http://www.justice.gov.uk>>) and submitting it – with a fee – to the court. The court officials will then 'serve' it on the defendant, who is given various options: either to admit the claim and pay; admit to part of the claim; defend the claim; or make a counter claim.
- 37.6 The key part of any claim form is 'The Particulars of Claim', where the claimant states his case. This will usually be similar in format to the 'Letter of Claim'. It is also important to attach any relevant documents.
- 37.7 If the defendant does nothing at all for 14 days, the claimant will automatically win the case by default.

### **Case Management**

- 37.8 Once the court office has received a claim form, a judge will 'manage' the case, which can involve a whole range of options and orders to the parties, with the aim of either resolving the matter without it going to court, or to facilitate the eventual hearing.



## **A 'Part 36' Offer**

- 37.9 At any time before or during the hearing, the defendant can offer to settle the claim by the procedure laid down in Part 36 of the Civil Procedure Rules 1998 (as amended). If the claimant does not accept this offer before it expires (normally 21 days) and continues with a hearing, but then does not win any more than was offered, the judge may award all the costs of the case since the expiration date of the offer against the claimant, making him far worse off than he would have been had he accepted it. (The judge must not be told what the offer is before he makes his judgment.)
- 37.10 This procedure (available since April 2007) replaced a similar system called 'payment into court' by which the defendant had physically to lodge the offer money with the court office.

## **The Statement of Case (The Pleadings)**

- 37.11 If the case is to go to court, the solicitor may instruct a barrister to take over the case and to draft the Statement of Case. This will especially be so if the matter is going to the High Court, where most solicitors do not have a right of audience. The 'Statement of Case' amounts to a written skeleton argument in which the barrister indicates in advance what points he or she will be putting to the court, together with a reference to any cases or statutes that s/he plans to cite in the court. It is vital that this is done properly, as a barrister may only present the case as outlined in the Statement of Case, even if s/he thinks of something better later on.

## **The Hearing/ 'Trial'**

- 37.12 The Civil Procedure Rules give the judge a great deal of flexibility regarding the conduct of the hearing (usually called a 'trial', though technically that only refers to criminal proceedings.). *Inter alia*, the judge can lay down timetables, allocating specific allocated times for the examination-in-chief, cross-examination and so on.

## **The Opening Speech**

- 37.13 It is usual for the claimant to begin, unless the defendant has admitted all the issues relevant to the claim and wishes only to raise a defence on which he has the burden of proof (such as whether an exemption clause is reasonable under UCTA 1977). In the opening speech, the counsel for the claimant will describe the nature of the claim and identify the issues to be tried by reference to the statements of the case/ pleadings. As the judge will have read all the papers in the trial bundle before the trial, he may dispense with this.

## **The Claimant's Case**

- 37.14 Counsel for the claimant will present evidence to the court, such as physical items, documents, photographs and the testimony of witnesses. The questioning of your own witnesses is called the 'examination in chief' and is subject to strict rules, such as a ban on hearsay evidence or leading questions. If (as is common) the witness has made a sworn witness statement before the trial, the questions will generally be designed only to clarify or expand on this. After the examination-in-chief, the witness may be 'cross-examined' by the counsel for the defendant, who may ask leading questions.

## **The Defendant's Case**

- 37.15 Following the claimant's case, counsel for the defendant may submit that there is 'no case to answer' – that is, that even without hearing the defendant's case, the court could not find the defendant liable on the basis of what has been presented by the claimant. This will rarely succeed. If – as is usual – the counsel for the defendant does decide to proceed, the evidence is presented according to the same rules as for the claimant's case.

## **Closing Speeches**

- 37.16 If he has presented evidence to the court, the counsel for the defendant will make the first closing speech to show how the inferences to be drawn from that evidence support his case, as well as arguing any legal points that have arisen.

## **The Role of the Judge**

- 37.17 During the course of the hearing, the judge may question the witnesses himself if necessary to clarify any points, will rule on any applications and deal with any objections to the admissibility of evidence etc. He must then decide where the truth lies and rule on any points of law to give a judgment for one side or the other.

## **Appeals**

- 37.18 As most appeals are on points of law only, there will generally be no evidence or witnesses, as the facts will have been decided. The barristers simply argue about what the law is and how it should apply to the decided facts.

# **PART 5: THE ENGLISH LEGAL PROFESSION**

## **38 SOLICITORS**

### **Functions of a Solicitor**

- 38.1 The legal profession in England and Wales is divided into two principal branches: solicitors and barristers. Solicitors greatly outnumber barristers (about 118,000 to 15,000).
- 38.2 Solicitors may usually represent their clients only in the lower courts, and, in certain cases, in the Crown Court. However a solicitor in independent practice may apply for the grant of higher courts qualifications under the Courts and Legal Services Act 1990. To qualify for this, the solicitor must undergo certain training. However, most of the solicitors' work is done in their offices, dealing with such non-contentious matters as conveyancing, drafting wills and forming companies for promoters etcetera.
- 38.3 If a layman requires the services of a barrister, he must normally approach him through a solicitor (see below) so a solicitor must prepare the papers ("the brief") for presentation to the barrister. Most legal matters however are easily dealt with by the solicitor without reference to a barrister.
- 38.4 The governing body of the solicitors' profession is the Law Society. However, since 2005 the regulatory and disciplinary functions of the Law Society have been dealt with by The Solicitors Regulation Authority (SRA). All prospective solicitors must enrol with the SRA, whilst membership of the Law Society has become voluntary.
- 38.5 Most solicitors work as either employees or partners in law firms, but they may now also work in Legal Disciplinary Practices or Multi-Disciplinary Partnerships, which means that the partnership of law firms may consist not only of lawyers but of other relevant non-law specialists. These 'Alternative Business Structures' are permitted under the Legal Services Act 2007 and are regulated by the SRA, the first being approved in 2012.

### **Qualifying as a Solicitor: The Legal Practice Course**

- 38.6 There are several ways to become qualified as a solicitor, but the most usual (at the moment) is to take a 'qualifying law degree' which involves the study of at least 7 prescribed legal subjects (Contract, Tort, Public Law, Equity and Trusts, Real Property, Criminal Law and the Law of the European Union), followed by a one year course called the 'Legal Practice Course'. This is followed by two years of apprenticeship with a firm of solicitors, called 'a training contract.' If you have taken a degree in a non-law subject, you can do a catch-up course called the 'Common Professional Examination' (or 'Graduate Diploma in Law') in one year, and then proceed as if you had taken a law degree. (London Metropolitan University has by far the best CPE course in the world.)
- 38.7 The SRA used to fix the minimum salaries for trainee solicitors, which until August 2014 was £18,590 (recommended £19,040) in central London and £16,650 (recommended £16,940) elsewhere. However, since August 1 2014, trainers are only obliged to pay trainees the national minimum wage.

## **Qualifying as a Solicitor: The Solicitors Qualifying Examination**

- 38.8 The Legal Education Training Review 2013 recommended a move towards objective based learning, where specific legal qualifications and courses would be less important than proven ability. In response to this, the SRA has published new training regulations which will enable candidates to qualify in a new way which will involve neither a law degree, nor the Legal Practice Course, nor a training contract.
- 38.9 This new route to the profession will be initiated in September 2021, and will involve graduates (in any discipline) taking two centrally-set (by Kaplan) sets of examinations, called the Solicitors Qualifying Examination Stage One and Stage Two. There will be no prescribed courses for these examinations, so technically you could do them without any training at all (though you would be unlikely to pass them without some instruction!)
- 38.10 The training contract will be replaced by two years of relevant work experience, which might amount to much the same thing as a training contract, but which should be more widely available.
- 38.11 Students who began their LLB or GDL studies in 2021 will still be able to follow the LPC route if they wish, but those who start later will have to take the SQE in order to qualify.

## **39 BARRISTERS**

### **Functions of a Barrister**

- 39.1 Most barristers practise advocacy in the courts, though much of their time is spent in their offices (known as 'chambers') preparing written opinions and the pre-trial documents. They have the right to appear in any court. The General Council of the Bar is the approved regulator of the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
- 39.2 Barristers appearing in the higher courts must observe a strict dress code which sometimes involves wearing a white curled wig, a white 'bib' instead of a tie (called 'bands') and (for junior barristers) a specially designed long black mourning gown, dating back to the death of Charles II in 1685. A recent survey showed that the vast majority of barristers were in favour of retaining this dress code, though the wig has been abolished already in some courts, including the Family Division of the High Court.
- 39.3 Barristers are bound by the "cab rank" principle, which means that they must take any cases offered to them without discrimination. Very successful barristers will often "take silk" (i.e. become a Queen's Counsel). This will give them access to more profitable cases and may work as a quasi-career path to becoming a judge. They also get to wear a silk robe and a bigger wig.
- 39.4 Barristers do not usually form partnerships, but work as self-employed contractors within a group in a set of 'Chambers', where they share office and administrative facilities, headed by a Queen's Counsel. Members of the Chambers also share the common services of a Business Manager (formerly called a Clerk).
- 39.5 Under the Courts and Legal Services Act 1990, certain traditional restrictions on barristers were lifted, including the removal of restrictions on the setting up of Chambers and the removal of the need to have a clerk to act as business manager. There is also a plan to set up of a system of funded pupilages.

- 39.6 Under the Legal Services Act 2007, further variations to this traditional arrangement may now be seen:
- Barristers may work in Legal Disciplinary Practices or Multi-Disciplinary Partnerships with solicitors.
  - They may also be employed directly by certain organisations (such as trade unions) and may take a "Public Access" course to enable them to offer some of their services directly to the public.
- 39.7 At one time, it was not possible to sue a barrister whose negligence in court had caused you to lose a case. This immunity has now been abolished. (*Arthur J S Hall v. Simons* [2000] 3 WLR 543)
- 39.8 The distinction between solicitors and barristers may be further eroded by such initiatives as the Alternative Business Structures, which have been available to solicitors since 2012. The extension of this business model to barristers was recommended to the Lord Chancellor by the Legal Services Board in 2016, and gained approval in 2017. This permits barristers to form partnerships regulated by the Bar Standards Board, and "to provide lawyers and non-lawyers with an opportunity to develop innovative and competitive models for the delivery of legal services which will be able to broaden choice for members of the public."<sup>35</sup>

## Qualifying as a Barrister

- 39.9 Barristers were traditionally the "gentlemen" who represented lesser mortals in court. To become a barrister you merely had to join one of the four exclusive London clubs known as the "Inns of Court"; engage in some mootings; and eat dinner at your Inn a prescribed number of times! It has become a little harder since then.
- 39.10 The educational qualifications are now similar to those of a solicitor - i.e. a law degree (or CPE/GDL) and a year of specialist training. The vocational stage of training has been given various names over the years, including 'The Bar Finals', 'The Bar Vocational Course' and 'The Bar Professional Training Course'. From 2020, the Bar Standards Board has approved a more flexible approach to vocational training to encourage more diversity at the Bar. Different providers may therefore now use different titles for their courses. For example, the new Inns of Court College of Advocacy calls its course 'The Bar Practice Course'.
- 39.11 On completion of the vocational stage, trainee barristers must complete at least one year of an apprenticeship within a set of Chambers: this is known as a pupillage. Until recently it was usual to be paid nothing for this year, which meant that in general only the well-off could afford to pursue this career. Trainee barristers must now be paid at least the minimum wage by the Chambers in which they are being trained. Although they usually get more than this, their actual pay is often very little compared to that of their colleagues training to be solicitors (the minimum pay is about £10,000 p.a.). However some top Chambers have been known to offer as much as £60,000.
- 39.12 There is massive competition for pupillages, so that most people who qualify as barristers are never able to practise. Even those who manage to complete a pupillage must – in practice – be accepted as a 'tenant' at a set of Chambers if they are ever to get any work, and this can also prove to be an insurmountable hurdle.

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<sup>35</sup> Source: <<https://www.barstandardsboard.org.uk/regulatory-requirements/regulatory-update-2016/bsb-regulatory-update-july-2016/alternative-business-structures-and-opportunities-for-the-bar-and-the-wider-legal-profession/>>.

- 39.13 Apart from the educational qualifications, there are also some rather bizarre requirements dating back to the 13<sup>th</sup> century. In order to be "Called to the Bar" it is still necessary to join one of the four ancient Inns of Court in London,<sup>36</sup> and to eat a minimum number of dinners there each term. This is known as "dining". Students who have to speed up this process can do so by eating twice as many dinners as is usual. This is known as "double-dining"!

## **Taking Silk**

- 39.14 Since the 17th century, eminent lawyers have sometimes been appointed by the monarch as "Her/His Majesty's Counsel learned in the law." These lawyers are called Queen's (or King's) Counsel, and because they wear a silk gown in court (rather than the heavy cotton one usually worn by 'junior' barristers) they are sometimes called 'silks', and on becoming a QC, they are said to have 'taken silk'. Silks can charge higher fees, benefit from instruction on more complex cases and enjoy the privilege of sitting in front of their junior barrister colleagues in court.

The appointment of QC's used to be shrouded in sinister mystery, involving secret soundings and significant taps on the shoulder! This became so disreputable a system that the appointment of new Queen's Counsel was suspended in 2003, and it was widely expected that the system would be abolished.

However, after much debate, the system was revived in 2005, but on the basis that future appointees would be chosen not by the government but by a nine-member panel, chaired by a lay person, to include two barristers, two solicitors, one retired judge, and three non-lawyers. Applicants are considered under a competency framework comprising five key areas: understanding and using the law; written and oral advocacy; working with others; diversity; and integrity. Those who make QC have to achieve excellence in all five competencies.

Formally, the appointment remains a royal one made on the advice of the Lord Chancellor, but he/she no longer comments on individual applications. The Lord Chancellor supervises the process and reviews the panel's recommendations in general terms (to be satisfied that the process as operated is fair and efficient).

In 2006, the first new QC's were appointed under this system.

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<sup>36</sup> Gray's Inn; Lincoln's Inn; Inner Temple; and Middle Temple.

## 40 THE JUDICIARY

### Judicial Appointment

- 40.1 England does not have a career-structure judiciary. All English judges, from the Justices of the Supreme Court to District Judges are chosen from the ranks of practising lawyers, mainly barristers.

Senior judges are appointed by the Queen on the advice of the Prime Minister.

- 40.2 The actual appointment of judges was somewhat shrouded in mystery, but under the Constitutional Reform Act 2005, a Judicial Appointments Commission was created on April 3<sup>rd</sup> 2006 as an independent body to select candidates for judicial office.<sup>37</sup> The JAC comprises 15 Commissioners, drawn from the judiciary, the legal professions, tribunals, the magistracy and the lay public. Twelve Commissioners, including the Chairman are appointed through open competition and three are selected by the Judges' Council.

Under the Constitutional Reform Act 2005, the JAC's statutory duties are to:

- select candidates solely on merit
  - select only people of good character
  - have regard to the need to encourage diversity in the range of persons available for judicial selection
- 40.3 According to their website, they make their appointments **“independently of government through fair and open competition and by encouraging a wide range of applicants. By selecting candidates using the principles of openness, fairness and merit, the Commission contributes to an effective and impartial judiciary.”** Hmm.<sup>38</sup>

### Judicial Qualification and Salaries

- 40.4 The requirements are now laid down in the Courts and Legal Services Act 1990.
- The Lord Chief Justice (Head of Criminal Justice and the Judiciary) commands a salary of £262,264
  - The President of the Supreme Court and the Master of the Rolls earn £234,184
  - The 12 Justices of the Supreme Court must have held high judicial office for not less than two years (High Court or Court of Appeal) or have had a 'Supreme Court qualification' for at least fifteen years. They earn £226,193
  - The 40 Lords and Lady Justices of Appeal (who sit in the Court of Appeal) must have a 10-year High Court qualification, or be a High Court judge. They earn £215,094.
  - The 107 High Court Judges (puisne judges) must have a 10-year High Court qualification or have been a circuit judge for at least 2 years. They earn £188,901.
  - Circuit Judges & Records must have a 10-year Crown Court or County Court qualification.
  - There are 622 Circuit Judges with a salary of £140,289.

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<sup>37</sup> <<https://www.judicialappointments.gov.uk/organisation/>>.

<sup>38</sup> For a full list of the current judiciary, go to <<https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/>>.

- District Judges is the designation for what used to be called Registrars of County Courts (civil) and Stipendary Magistrates (criminal). There are 459 District Judges with salaries of £112,542 (more in London).
- Recorders and Deputy Judges are practising barristers and solicitors who are temporarily appointed to hear minor cases, partly to train them up as judges, but more often to reduce the backlog. There are several thousand Recorders and Deputy Judges.

## **Judicial Training**

- 40.5 The Judicial Studies Board arranges induction courses and seminars for trainee assistant recorders and new circuit judges, and refresher seminars for experienced judges.

## **Lord Chancellor (Historical Note)**

- 40.6 The Lord Chancellor was the only judge appointed on a political basis. He was appointed by the Queen on the advice of the Prime Minister, and was a member of the Government. He was head of the House of Lords (both parliamentary and judicial) and of the judiciary in general.

The first Lord Chancellor was Angmendus in 605. The last 'traditional' Lord Chancellor was Lord Irvine of Lairg, who had been especially controversial, partly for spending £650,000 of taxpayers' money on redecorating his official residence (despite having a salary of over £210,000 and a pension package worth over £90,000 a year).

Lord Irvine was relieved of his duties on June 12th 2003 and his 1,400-year-old post abolished by Tony Blair. The many functions of the Lord Chancellor (except for his judicial ones) were transferred to Lord Falconer of Thoroton QC, who had been appointed to the new post of Secretary of State for Constitutional Affairs. However, Lord Falconer still called himself the Lord Chancellor, and stated his intention to continue to do so even after the functions of the post had been abolished!

The current Lord Chancellor is Rt. Hon Robert Buckland QC, who adds the title to that of Secretary of State for Justice. However, the post now has nothing to do with the practising judiciary. (The Supreme Court is now governed by a 'President' whilst the Lord Chief Justice is the overall President of the Courts of England and Wales.)

## **41 MAGISTRATES**

- 41.1 There are about 16,000 unpaid part-time lay magistrates and about 140 district judges<sup>39</sup> and 170 deputy district judges (formerly called stipendiary magistrates) operating within some 330 magistrates' courts in England and Wales. They deal with about 97% of all criminal cases!
- 41.2 District Judges must be solicitors or barristers of at least seven years standing, but ordinary magistrates have no legal qualifications. They undergo a year long course to prepare them for their work, but legal issues in court are handled by their legal advisers (formerly called justice's clerks).

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<sup>39</sup> There are 459 District Judges in total, including those that work in the civil courts.



- 41.3 Magistrates are appointed after consultation with local advisory committees. People may be proposed by local interest groups (such as political parties and trade unions) and are meant to represent the communities in which they serve. Unfortunately, most magistrates are white, middle-class and middle-aged, whatever the community. In an attempt to rectify this, some local authorities have started to advertise for magistrates on local radio and on the sides of buses etcetera!
- 41.4 A defendant is far more likely to be acquitted by a Crown Court jury than by the magistrates: 57:30

## **42 OTHER LEGAL PRACTITIONERS**

### **Licensed Conveyancers**

- 42.1 Until 1985, only a solicitor could professionally engage in conveyancing (i.e. carrying out the legal formalities for the sale of land). In the Administration of Justice Act 1985, this monopoly was broken and it is now possible to qualify simply as a conveyancer.

### **Legal Executives**

- 42.2 Most solicitors employ staff who are not actually solicitors themselves, but who do legal work of a high standard. With practical experience and a series of examinations they may qualify as legal executives, and be admitted to the Chartered Institute of Legal Executives. There are currently over 20,000 of these, many of whom may go on to become fully qualified as solicitors.

### **Paralegals**

- 42.3 Solicitors may employ trained staff to assist with the preparation of cases. At one time, this was a good career choice for someone with just a law degree, but increasingly the positions are taken by graduates of the Legal Practice Course who are waiting to get Training Contracts.

## PART 6:

# LEGAL PRACTICE AND LEGAL SCHOLARSHIP

### 43 LEGAL PRACTICE

- 43.1 In practical terms the legal enterprise often consists of advising clients how they may best use the law to achieve their objectives. These objectives vary widely, but it is worth identifying some of the more common possibilities, spanning a range from the wholly non-contentious, in the sense that they are highly unlikely ever to go to court, to the wholly contentious, in the sense that they are already the subject of legal proceedings in court.
- 43.2 Matters such as making a will are almost always non-contentious, as are straightforward conveyancing transactions. Even matters such as these, however, are potentially contentious, in the sense that the court may subsequently have to adjudicate upon the validity or effect of the will, or on the rights and obligations of the parties to the conveyancing transaction. Conversely, the parties often settle contentious matters by agreement, because they perceive it to be in their best interests to do so. As Lord Mackay LC said: *'The interests of justice are, in my opinion, served by the promotion of early settlements'*.<sup>40</sup>
- 43.3 An obvious question arises at this point: if very little of a typical lawyer's work ever gets anywhere near a court, why does practically everything which you do as a law student focus on what the courts will and will not do? In fact, the answer is as obvious as the question. In order to advise a client properly, a lawyers needs to know, among other things, what the relevant law is, because - as we have already noted - anything may come before a court in due course, however unlikely it may seem that this will happen. It follows from this that a good grounding in the techniques which the judges use is an invaluable foundation on which to build the habit of thinking like a lawyer.

### 44 LEGAL SCHOLARSHIP

- 44.1 There are many different models of legal scholarship, reflecting substantial variations in the degree of emphasis placed on sociological, economic and political factors. However, Feldman provides a useful version of a traditional model of scholarship in general:

*'It is the attempt to understand something, by a person who is guided by certain ideals, which distinguishes scholarship both from the single-minded pursuit of an end and from dilettantism.*

*The ideals include: (1) a commitment to employing methods of investigation and analysis best suited to satisfying that curiosity; (2) self-conscious and reflective open-mindedness, so that one does not assume the desired result and adopt a procedure designed to verify it, or even pervert one's material to support a chosen conclusion; and (3) the desire to publish the work for the illumination of students, fellow scholars or the general public and to enable others to evaluate and criticize it.'* (The Nature of Legal Scholarship (1989) 52 MLR 498.)

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<sup>40</sup> *O'Sullivan v Herdmans Ltd* [1987] 3 All ER 129.

- 44.2 Notice, in particular, that Feldman's point (2) recognizes an essential distinction between academic and practising lawyers, in that the former do not have clients!

*The Joint Statement of the Bar Standards Board and the Solicitors Regulation Authority on the foundations of Legal Knowledge states:*

"The criteria for Legal Research are: The ability to analyse a problem involving a question of law, and through research to provide a solution to it. This involves the ability:

- I) to identify and find relevant legal sources and materials;
- II) to extract the essential points from those legal sources and materials;
- III) to apply the law to the facts of the problem so as to provide satisfactory answers to the question posed; and
- IV) to communicate the reasons for those answers, making use of legal sources and materials."

# PART 7: LEGAL REASONING

## 45 INTRODUCTION

- 45.1 Lawyers are notoriously argumentative, appeals are often allowed and multi-judge courts quite often fail to give unanimous decisions. It should be obvious, therefore, that legal method is not a simple, mechanistic process. In fact, it is often a creative process, in which you are constructing an argument as a means of trying to achieve a particular outcome.
- 45.2 If you ask who decides what the outcome should be, you will see that, broadly speaking, there are three possible answers;
- the clients (after all, it is proverbial that *'those who pay the piper call the tune'*, which, in the present context, means that the lawyers' duty is to present the best legal argument in favour of their clients);
  - the lawyers themselves (because there are some clients who are happy to leave the conduct of their affairs - at least in some kinds of cases - in the hands of their lawyers, with only the most general of instructions as to what they want the lawyers to do);
  - the clients in consultation with their lawyers - but remembering that the clients are entitled to reject their lawyers' advice.
- 45.3 Of course, none of these possibilities applies to some of the most influential lawyers - namely the judges! In their case, of course, there will never be, strictly speaking, a desired outcome which is identified in advance, because the adversarial basis of the English judicial process requires them to adjudicate between the arguments which are presented to them by the advocates. However, it would be naïve to assume that this means that judges are wholly detached from their own decision-making processes. For example, some judges are more inclined than others to follow the existing case-law and leave it to Parliament to correct any previous decisions which create continuing injustice. Others are more inclined to undertake law reform themselves in the course of an individual decision. Furthermore, even judges have their own personalities (for example, they may be liberal or authoritarian; sympathetic to religious belief or not; and so on). In reality, the judges' attitudes to questions such as these may well have a significant impact on the outcomes of individual cases.
- 45.4 Whatever the context, and whatever the nature of the influences on an individual lawyer's mind, there can be no doubt that (in the most interesting cases, at any rate) lawyers are
- taking a given set of raw materials (legal doctrine of one sort or another) and;
  - using those materials to construct an argument which they will then claim leads inevitably to a particular conclusion.
- 45.5 This creative element in legal method makes it necessary to consider (even if only very briefly) two other matters, namely the way in which reasoned argument works (both generally and in relation to law) and the constitutional role of the judge.
- 45.6 But this leaves open the question of where do the statements of law and of fact come from? The answer, of course, is that the statements of law come from the sources of law which have been outlined above, while the statements of fact come from either agreement between the parties or from the court's assessment of the evidence given on behalf of the parties.

- 45.7 From the point of view of legal method, there is very little to say about the factual element. But if we stay with the legal element, it will be obvious that the law will be found principally in a variety of texts, the origins of which may be generally classified as being either legislative or judicial (i.e. statutes, treaties and so on; or decisions of the courts).
- 45.8 Pausing only to comment that it is of the first importance that all the relevant sources should be assembled before you start using them to construct an argument, it then becomes obvious that the meaning of those texts must be identified - or, in other words, the texts must be interpreted - after which the weight to be given to each statement of law must be identified. It is important that the process of argument should be valid, which requires that we examine the method of legal reasoning used by common lawyers.

## 46 METHODS OF REASONING

### Inductive Reasoning

- 46.1 This involves making a number of observations and then proceeding to formulate a principle which will be of general application. Sometimes known as the empirical method, it is very common in scientific experimentation and data analysis

### Deductive reasoning

- 46.2 This involves stating one or more propositions and then reasoning to a conclusion by applying established principles of logic. This is common in mathematics and theoretical physics: abstract thinking based on rules of logic

### Reasoning by analogy

- 46.3 If a number of different things are similar to each other in a number of different specific ways, they are, or should be similar to each other in other ways as well. This is prevalent in Common Law systems: an applying the *ratio* of earlier cases is the building block of the system of judicial precedent in the Common Law

### Normative Reasoning

- 46.4 This involves "ought" statements. It is controversial as it touches on the relationship between law, morality, ethics and justice. (See the Natural Law v Positivism debate.) Yet the latter gives the "Law" a lot of its force or power.

## 47 VIEWS ON LEGAL REASONING

- Legal Realism (Holmes): *"the life of the law has not been logic, it has been experience"* in the Path of the Law.
- Although legal reasoning a process of logic, behind it there lie implicit attitudes or presumptions. Law as a (social) science.
- Dworkin: *"standards"* beyond the text of the law. The existence of *"policies"* (a kind of standard that sets out a goal to be reached) and *"principles"* (a standard that is to be observed, a desirable, just or fair situation to be attained)
- Goodrich: The (im)possibility of the literal meaning of the law. *"A literal meaning is always an interpretative meaning. A selection has to be made."*

## 48 SYLLOGISTIC LOGIC

48.1 Legal reasoning is based on syllogistic logic. That is to say, in order to reach a decision a judge must state a major premise (a point of decided law, from whatever source); a minor premise (the facts of the given case as established by the evidence); and from these two premises, draw a conclusion.

48.2 The classic syllogism:            If A=B (Major premise)  
   and B=C (Minor premise)  
   then A=C (Conclusion)

### 48.3 Example

Major premise:            It is a crime to kill another human being

Minor premise:           Peter has killed a human being

Conclusion:                Therefore, Peter has committed a crime

48.4 However, even at their simplest, syllogisms rarely produce a definite answer. Because of the way that common law and equity have developed, bending both to public and social policy as well as the caprices of the individual judges, there is frequently more than one principle of 'established' law that is available to meet a given situation, even supposing that the judges will follow it. Thus, there is more than one viable conclusion.

The answer to almost any legal problem is therefore neither 'yes' nor 'no', but rather 'it depends'!

48.5 **Formulation of the premises is thus all important. Various factors need to be considered in legal analysis.**

- Deciding Law and Fact
  - The former as the major premise
  - The latter as the minor premise
- The hierarchy of the sources of law
  - Which source is the most authoritative? Establish the law to be used.
- Establishing the relevant facts (evidence and discovery)
- Applying the law to the situation at hand
- Remembering the existence of implicit presumptions and conflicting principles of law.

## PART 8: MATTERS OF FACT v. MATTERS OF LAW

### 49 FACT AND LAW

- 49.1 Under the adversarial system which characterizes the English judicial process, the parties are generally in charge of the conduct of their cases. However, for the present purposes, we can proceed on the basis of the short form of the proposition and represent the principal consequences of classifying a matter as one of law or fact as follows:

Matters of Fact	Matters of Law
Established by evidence or agreement (or, exceptionally by judicial notice).	Established by legal argument or agreement.
Subject to the doctrine of <i>res judicata</i> but not <i>binding precedent</i> .	Subject to the doctrine of <i>binding precedent</i> , but not <i>res judicata</i> .
Generally give rise to limited rights of appeal.	Generally give rise to more extensive rights of appeal.

#### How is the distinction between fact and law drawn?

- 49.2 In practice, it will generally be obvious whether a matter is one of fact or one of law. For example, if A kills B during a fight, the question of who did what is clearly a matter of fact, but the definition of self-defence is clearly a matter of law.
- 49.3 However, there are also many cases where the distinction is less than obvious. For example, in *Brutus v. Cozens* [1972] 2 All ER 1297, the House of Lords held that the meaning of an ordinary word of the English language is a matter of fact and is therefore to be decided by the tribunal of fact, rather than by a court which exists to hear appeals on points of law. (More particularly, the House held in this case that the meaning of the word insulting is a matter of fact, on the basis that ordinary people know insults when they see or hear them.)
- 49.4 On the other hand, there may be good constitutional reasons for holding that a question of interpretation is a matter of law - see, for example, the decision of the House of Lords in *Energy Conversion Devices Incorporated's Applications* [1982] FSR 544, where Lord Diplock, expressing the unanimous opinion of the House, said: '*Your Lordships should, however, in my view take this opportunity of stating once again the important constitutional principle that questions of construction of all legislation, primary or secondary, are questions of law to be determined authoritatively by courts of law; that errors in construing primary or secondary legislation made by inferior tribunals that are not courts of law, however specialized and prestigious they may be, are subject to correction by judicial review; no tribunal and no court of law has any discretion to vary the meaning of the words of primary or secondary legislation from case to case in order to meet what the tribunal or court happens to think is the justice of the particular case. Tempting though it might sound, to do so is the negation of the rule of law. If there are cases in which the application of the Patents Rules leads to injustice, the cure is for the Secretary of State to amend the Rules. If what is thought to be the injustice results from the terms of the Act itself, the remedy is for Parliament to amend the Act.*'
- 49.5 Although the cases cited above may seem reasonably clear, there is no doubt that, in practice, the need to distinguish matters of law from matters of fact presents continuing difficulty.

## **PART 9: LEGAL WRITING**

### **50 CEMENTING THE FOUNDATIONS OF LAW**

50.1 Simply put, legal sources and authorities are the tools lawyers use to build and win their cases. This means that in researching and writing legal exercises you **MUST** have recourse to these to inform, consolidate and support the legal opinion you give. Good writing and an awareness and understanding of legal context and argument are useful skills but they come second to knowing the law itself. In a nutshell, you cannot bluff your way through researching and writing a legal exercise without knowing the law. For examiners and readers of your work it is a simple test; you either know the relevant law to your chosen topic or you do not.

- Writing legal exercises is a learned skill
- Time is of the essence, so efficient learning required
- It is necessary to read, understand and summarise legal materials
- Fluency in language and precision in detail required
- Legal writing and Research = a new skill, distinctly different from the skills studied in humanities, the sciences and other social sciences.

### **51 PREPARING WRITTEN LEGAL WORK**

#### **Key Aspects**

- Content
- Structure
- Focus
- Expression
- Presentation

#### **Drafting the Work**

- Regular, consistent application and steady progress
- Using the essay title to focus and filter
- Familiarity with central concepts
- Use of Sources
- Putting together your own creation
- Avoiding the temptation to plagiarise
- Clarity in expression and sentence structure

#### **Use of Authorities**

- Have you identified and demonstrated knowledge of the relevant legal principles?
- Have you shown why it should apply in your answer (i.e. have you shown why it is relevant)?
- Have you shown the source of this principle? Statute? Case? Other



## Citing Cases in Written Work

There are a few rules to follow in writing down the names of cases:

- You must cite the name of *both* the claimant/ appellant/ prosecutor *and* the defendant/ respondent, with the letter 'v.' between their names (unless the case name is *Re: Someone* or similar). Do NOT write 'vs' or 'versus'. This is an American style citation, not English.
- The names of the parties should either be underlined or put in italics. (Technically, you should not underline or italicize the 'v.', but this convention is not always observed.)
- If the parties have long names, it is usually acceptable to use an abbreviated version. In particular, it is common to miss out words such as 'Borough Council' and 'Limited' from the case names.
- In criminal law cases called *R. v. Someone*, it is acceptable to call the case just by the name of the defendant.
- In shipping cases, it is acceptable to call the case just by the name of the ship.
- Whenever a case is first cited in printed legal writing (as opposed to a hand-written exam essay) the full case citation should be included in the footnotes, using the OSCOLA style of referencing.

## Writing Up

### Content

- Basic Structure – see manuals and textbook chapters
- Research your essay
- Know your stuff! This means more than just the lecture or tutorial notes
- Demonstrate that you have read around the topic
- Cases and Statutes – are the most important ones there?
- Contentious areas/ academic debate – are you familiar with them?
- Any knowledge of possible future developments in the area?

### Style

- Introduction and conclusion are essential for essay questions
- Understand the question set by breaking down the question before writing
- Develop an essay plan
- Flow of discussion – develop your points one by one
- Can you lucidly explain the main points of a concept?
- Do your sentences make sense (read over your essay)?
- Do you refer back to the question? Focus on the "pitch" of the question asked and keep this in the back of your mind while writing
- Is there confidence in the subject matter?
- Do you understand the relative importance of legal authorities chosen?
- Do you have a coherent line of argument throughout supported by legal authority?

## Answering Problem Questions

In many subjects you will be expected to write answers to "problem" questions. A hypothetical set of facts will be given and you will be asked to "discuss" the matter or "advise" one of the characters in the problem. The answering of problem-type questions demands a special technique of its own and is a skill, which can improve considerably with practice. The basic requirement is to apply the law to the given fact situation. All the different possibilities must be considered before you give your own opinion as to the most likely conclusion, with reasons.

- Identify who you are advising and what their problem is. However **DO NOT WRITE OUT THE QUESTION AS PART OF YOUR ANSWER.**
- Identify the legal issues involved and the relevant legal facts
- State the relevant law and any relevant academic commentary applicable to the legal issues identified. Make sure that every legal principle you state is supported by authority (e.g. a decided case or a statutory provision.)
- Apply this law to the facts
- Reach a conclusion: e.g. are there any remedies for your clients?

### Tips

- Once you are clear who it is you are required to advise the key to a good answer is a methodical approach, lucid expression and clear structure.
- Read the question thoroughly, and answer the question asked, not an imaginary one or one you want to answer. In particular, do not just tell the examiner everything you know about a subject in the hope that some of it might fit the actual question. You will actively lose marks for doing this, even if what you say is actually correct. Everything you say must be **RELEVANT**.
- There are usually one or two main areas to these questions. Identify and prioritise them. Do not spend time on marginal or unlikely areas.
- You might wish to break up your answer with sub-headings designed to identify the relevant issues.
- Keep focused – although speculation may be reasonable, deal with the relevant facts at hand and apply the law to them in a logical way. In essence, avoid "What if?" questions. Fact not fiction is what matters.
- Structure your answer according to the method described above. Take each party in turn. Where there is an overlap of legal issues relevant to all the parties you are asked to advise, deal with it in detail once.
- Use appropriate legal terminology accurately.
- Read through your work to check for errors of grammar, punctuation and spelling.

## 52 DISSERTATIONS AND COURSEWORK

- Use quotes but do not over-quote. Keep them short, punchy and relevant.
- Your work should be more than just descriptive narrative. It should be critical too in its engagement with the question.
- There should be evidence of research conducted. The Research Trail helps provide this.
- There should be a clear, extensive and relevant bibliography for the dissertation– two or three sources is not enough – show thoroughness of research. Format your bibliography carefully: Journals, books etc. in separate sections and full citations including year.
- You should reference authorities or sources throughout the dissertation.
- You must use OSCOLA referencing.
- You should use the classic dissertation style of innovative and coherent introduction of the areas of discussion, main body of discussion and authoritative summary/conclusion

- You should take great care with the language, syntax and general exposition of your essay. High marks will only be awarded where the dissertation shows an authority of style and precision of language.
- Keep to the word limit
- Prepare in advance and hand your dissertation in on time!

## 53 SUMMARY

*Look at your work critically. Ask yourself if you have achieved the following outcomes.*

- Identify and discuss the relevant legal concepts
- Identify and coherently examine any relevant policy issues
- Demonstrate relevant primary and secondary source research
- Demonstrate an ability to apply knowledge to the stated problem/ question
- Draw reasoned conclusions, which are supported by argument and legal authority
- Produce an accurate and up-to-date picture of the law in this area
- Use appropriate terminology and language for a formal legal assessment
- Show an ability to present an analytical argument in a comprehensible manner

## 54 WHAT NOT TO DO WHEN WRITING A LAW ESSAY

**Questions you do not want the examiner to ask when reading your work**

So?

Why did you say that?

How is that relevant?

What does that mean?

How have you reached that conclusion?

On what legal authority is that argument based?

What else is there (e.g. case law or statutes)?

**Phrases to use with caution**

Therefore...

Thus...

It follows...

As can be seen....

Surely...

It is obvious that...

This seems unfair...

Clearly...

**Why do you need to exercise caution with these phrases?**

In themselves these phrases are fine, but usually there is little or no substance to justify them. For example:

*The law of negligence demands that there must be a direct link between the accident and the injury or damage suffered. We have seen that Adam and Berni were involved in an accident in which Berni says Adam failed to slow down approaching the junction and that Berni has suffered a broken leg from the collision. Therefore (or "Thus", or "Clearly", or "Surely" etc) Adam is liable to compensate Berni for all her injury.*

There is a superficial air of logic about this, until you analyse it. What does the "therefore" relate to? The first sentence is a general proposition (generally correct as it turns out). But

after that all we really know is that Adam and Berni had a collision. We do not know whose fault it is (presumably this is being disputed). And even assuming Adam that was negligent (and there are a number of other factors to consider before making that judgment), we do not know if Berni contributed to the accident in some way so that Adam would not be liable to pay for *all* her injuries.

Here is another example: *We know from the facts that Berni shot Adam at close range and that he died of his wounds. Surely she is therefore guilty of murder.*

The one word - "surely" - betrays such a lack of knowledge in terms of both dealing with evidence and the law on homicide that this sentence is quite frightening in its stupidity. Even a non-lawyer would be able to see that Berni may not have meant to fire the gun or she may have fired it in self-defence. Once you have studied Criminal Law you will also see that there may be other technical reasons why she is not liable for murder. So, the use of the word "surely" is very dangerous: it pretends that there cannot possibly be any other answer and, in doing so, reveals a complete inability to think (never mind to think like a lawyer).

### **Bad ways to start an essay**

- Saying: "X is clearly liable"

### **Really? So why was the question asked?**

- Saying everything you know about the area of law concerned, whether or not it is relevant.

**The classic "shotgun" approach. Focussing on the specific question you have been asked is a key legal skill.**

- Saying nothing of substance, but simply listing cases.

**The "I've learned all this so I must pass" approach.**

### **Incorrect use of cases**

- "X will be liable for his offer: see *Carlill v. Carbolic Smoke Ball Company*."

**So, exactly why should we see *Carlill v. Carbolic Smoke Ball Company*? Does it cover X's case as well? Was X a party to *Carlill v. Carbolic Smoke Ball Company*? There is no reasoning present here.**

- "The case of *Carlill v. Carbolic Smoke Ball Company* will apply here."

### **But I am not going to tell you how!**

- "An offer to the world can be binding (*Carlill v. Carbolic Smoke Ball Company*) and so the advert will be valid."

**When will the offer be binding? Did *Carlill v. Carbolic Smoke Ball Company* really lay down a principle for all adverts? You need to analyse both the authority and its application to the facts given in the question.**

- “The law on offer and acceptance demonstrates that the terms must be clear: *Carlill*; *Boots v. Pharmaceutical Society of Great Britain*; *Fisher v Bell*. Thus, X will be bound (see also *Partridge v. Crittenden*).”

**The "I've learned all this so I must pass" approach again (but with more cases).**

n.b. To cite cases correctly you must, of course, know the names of the parties. You generally need to know the names of both parties and how to spell them. You do not generally need to learn the date the case was either decided or reported, though this is sometimes relevant to a chronology or to comment on the prevailing policy at the time.

# PART 10: LEGAL RESEARCH

## 55 TEXTBOOKS, JOURNALS AND ENCYCLOPAEDIAS

- 55.1 You MUST read PRIMARY SOURCES: reading the actual judgments of the cases and the actual statutes you intend to rely on is the only way to discover the detail and nuance of the law. This is where the true law is to be found, not in the versions presented by other commentators – however well respected they might be. You would not study fine art by looking only at photographs of famous paintings; or study great orchestral symphonies by listening only to the piano reductions!
- 55.2 That said, there is nothing wrong in using legal commentaries to get an overview of a subject and an idea of current legal thinking.
- Textbooks: remember these are just introductions to legal subjects. Beware any book that has the words 'Made Simple' or 'Nutshell' or 'Idiot's Guide' in its title. Textbooks by their nature are already a simplified version of the law. If they boast that they are 'very easy to understand', it is extremely likely that they are actually inaccurate.
  - Cases and Materials Books: essentially reference books to key legal authorities with commentary and annotation.
  - Practitioners' Books/Tomes: scholarly works with particular emphasis on aspects of a certain legal topic.
  - Legal Encyclopaedias: the leading encyclopaedia of law is Halsbury's Laws of England, which is available online (through Lexis Library), and which is constantly updated. It is particularly useful at guiding you to the appropriate Primary Sources (which will usually be hot-linked).
  - Articles: aimed at academic audience and expected to be used by students, the most up-to-date discussion on the law.
  - Reports: a broad range of different possible discussion of different sources of law.

## 56 LEGAL DATABASES

- 56.1 The availability of legal databases has dramatically altered the scope and method of legal research. One of the key professional databases is LEXIS LIBRARY, which will give you access to virtually every case ever reported, and a great many that have not, as well as every Act of Parliament, in both its original and current version.
- 56.2 Students of commercial law will also have particular use for The Lloyd's Law Reports/ Lloyd's Reports which is a specific collection related to maritime and insurance issues, and contains many cases which are not available elsewhere. As the collection is owned by Informa, it is only available in its complete version online at Informa's own database – iLaw.
- 56.3 You can search for cases either by the name of the litigants; by subject matter; or by keywords. As well as giving the full text of most of the judgments (which you can print out either just as text, or as a pdf version of the published Law Reports), each case contains an 'analysis', which includes a summary of the case and a list of other related cases (both previous and subsequent), so you can tell at once if the case has been followed or overruled.

## 57 OSCOLA REFERENCING

- 57.1 When you are writing a legal essay, it is vital that you tell the reader the precise source of your materials, whether it is a primary source (such as a case or statute) or a secondary source (such as a journal article).
- 57.2 Lawyers do this by the use of footnotes and bibliographies, following the guidelines of the Oxford University Standard for the Citation of Legal Authorities (OSCOLA).<sup>41</sup>
- 57.3 For quick reference (as in the OSCOLA Quick Reference Guide) these are the main rules.

### Primary Sources

#### General Rules

- Do not use full stops in abbreviations.
- Separate citations with a semi-colon.
- Put a full-stop after the citation in the footnotes, but not in the bibliography.

#### Cases

- Give the party names, followed by the neutral citation, followed by the Law Reports citation (eg AC, Ch, QB).
- If there is no neutral citation, give the Law Reports citation followed by the court in brackets.
- If the case is not reported in the Law Reports, cite the All ER or the WLR, or failing that a specialist report.

*Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 1 AC 884 R  
*Roberts v Parole Board* [2004] EWCA Civ 1031, [2005] QB 410  
*Page v Smith* [1996] AC 155 (HL)

- When pinpointing, give paragraph numbers in square brackets at the end of the citation. If the judgment has no paragraph numbers, provide the page number pinpoint after the court.

*Callery v Gray* [2001] EWCA Civ 1117, [2001] 1 WLR 2112 [42], [45]  
*Bunt v Tilley* [2006] EWHC 407 (QB), [2006] 3 All ER 336 [1]–[37]  
*R v Leeds County Court, ex p Morris* [1990] QB 523 (QB) 530–31

- If citing a particular judge, put the name of the judge in round brackets.

*Arscott v The Coal Authority* [2004] EWCA Civ 892, [2005] Env LR 6 [27] (Laws LJ)

- Put the case name in italics in the footnotes, but not in the bibliography.

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<sup>41</sup> <[https://www.law.ox.ac.uk/sites/files/oxlaw/oscola\\_4th\\_edn\\_hart\\_2012.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf)>;  
<[https://www.law.ox.ac.uk/sites/files/oxlaw/oscola\\_4th\\_edn\\_hart\\_2012quickreferenceguide.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012quickreferenceguide.pdf)>.

## **Statutes and Statutory Instruments**

Act of Supremacy 1558  
Human Rights Act 1998, s 15(1)(b)  
Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166

## **EU Legislation and Cases**

Consolidated Version of the Treaty on European Union [2008] OJ C115/13  
Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1, art 5  
Case C-176/03 Commission v Council [2005] ECR I-7879, paras 47–48 European Court of Human Rights Omojudi v UK (2009) 51 EHRR 10 Osman v UK ECHR 1998–VIII 3124 Balogh v Hungary App no 47940/99 (ECHR, 20 July 2004) Simpson v UK (1989) 64 DR 188

## **Secondary Sources**

### **Books**

- Give the author's name in the same form as in the publication, except in bibliographies, where you should give only the surname followed by the initial(s).
- Give relevant information about editions, translators and so forth before the publisher, and give page numbers at the end of the citation, after the brackets.

Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) 268  
Gareth Jones, Goff and Jones: *The Law of Restitution* (1st supp, 7th edn, Sweet & Maxwell 2009)  
K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998)

### **Contributions to Edited Books**

Francis Rose, 'The Evolution of the Species' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006)

### **Encyclopedias**

Halsbury's Laws (5th edn, 2010) vol 57, para 53

### **Journal Articles**

Paul Craig, 'Theory, "Pure Theory" and Values in Public Law' [2005] PL 440

When pinpointing, put a comma between the first page of the article and the page pinpoint.

JAG Griffith, 'The Common Law and the Political Constitution' (2001) 117 LQR 42, 64

### **Online Journals**

Graham Greenleaf, 'The Global Development of Free Access to Legal Information' (2010) 1(1) EJLT < <http://ejlt.org/article/view/17> > accessed 27 July 2010

### **Command papers and Law Commission Reports**

Department for International Development, *Eliminating World Poverty: Building our Common Future* (White Paper, Cm 7656, 2009) ch 5  
Law Commission, *Reforming Bribery* (Law Com No 313, 2008) paras 3.12–3.17 Websites and blogs  
Sarah Cole, 'Virtual Friend Fires Employee' (*Naked Law*, 1 May 2009) accessed 19 November 2009

### **Newspaper Articles**

Jane Croft, 'Supreme Court Warns on Quality'



# PART 11: JUDICIAL ETHICS<sup>42</sup>

## 58 JUSTICE, NOT TRUTH

58.1 The judge is an umpire in a contest, not a seeker of truth

58.2 The judge is a disinterested, detached referee, with two purposes:

- i. To resolve procedural disputes before or during the trial; and
- ii. To decide who wins the case on the basis on the evidence adduced and the legal arguments which have been advanced.

It is not the role of the judge to act as a detective or inquisitor, but simply to do - and to be seen to be doing - justice between the parties, based on the available evidence and the law.

58.3 The judge lets the parties and their lawyers prepare and present their cases, raising such arguments and adducing such evidence as they see fit, only interfering if one party raises a legal objection to what the other side is doing.

58.4 After the trial, the judge gives his decision, resolving issues of fact and law according to his assessment of the evidence and the arguments presented.

58.5 *"The first and most striking feature of the common law is that it puts justice before truth. The issue in a criminal prosecution is not, basically, "guilty or not guilty?" but "can the prosecution prove its case according to the rules?" These rules are designed to ensure "fair play" even at the expense of truth.*

*"Perhaps the most obvious example of this principle is the rule that a prisoner cannot be made to expose himself to cross-examination if he does not want to. The attitude of the common law to a civil action is essentially the same: the question is "Has the plaintiff established his claim by lawful evidence?", not "has he got a good claim? Again, justice comes before truth."<sup>43</sup>*

58.6 *"Provided that he has been given a fair trial and that the judge has been seen to be careful and impartial, a plaintiff who has been wrongly disbelieved, painful through it may be, ought not to feel that he has been the victim of injustice."<sup>44</sup>*

### **Should a judge seek to obtain evidence independently of the parties?**

58.7 It is a well-established rule that a judge cannot obtain evidence independently of the parties, or even require the parties to produce evidence, except on the application of a party.

58.8 ***In re Enoch and Zaretsky, Bock and Co's Arbitration* [1910] 1 KB 327 (CA)**

Enoch bought 1,500 tons of Rangoon rice bran from Zaretsky, Bock and Co.. The contract of sale contained an arbitration clause, and when a dispute arose, the parties each appointed an arbitrator, and the arbitrators appointed F.W.Lymburg to be umpire. The sellers contended that Lymburg did not conduct the arbitration and impartially.

<sup>42</sup> This section is based on – and substantially quotes from – Lord Neuberger, *The Role of the Judge: Umpire in a Contest, Seeker of the Truth or Something in Between? Remarks*, Singapore Panel of Judicial Ethics and Dilemmas on the Bench, August 19th 2016.

<sup>43</sup> Viscount Kilmuir LC, 'Introduction to the Common Law' [1960] 76 LQR 41, 43.

<sup>44</sup> Lord Devlin, 'Who is at Fault When Injustice Occurs?' (1970).

*Inter alia*, he insisted upon the attendance of Mr. Zareyzky himself to give evidence, despite the fact that he had nothing directly to do with the contract; and, without the sellers' consent and without informing them of the nature of the evidence, he called Mr Kolwey as a witness, giving great weight to his evidence, whilst refusing to hear some of the sellers' evidence at all.

He found for the buyers. The sellers applied to have the umpire removed (under the Arbitration Act 1889, s.11).

The Divisional Court dismissed the application, but the seller's appeal was allowed by the Court of Appeal.

*"The umpire thought fit formally to rule that one of the parties, Mr. Zaretsky, a gentleman not personally connected with this matter and who had not been concerned with it, must give evidence. What possible authority has an umpire to do that? I do not know.*

*"The next thing is that this umpire took upon himself to call a gentleman whose name is Mr. Kolwey, living in London, representing a company carrying on business at Burma. What right the umpire had to call a witness, I confess I do not understand."*

per Cozens-Hardy MR at p.330

*"The point to which I wish to allude is the question of the umpire himself procuring evidence in the arbitration. It is quite clear, both from his conduct and from the line that has been taken by counsel for the respondents on this appeal, that there is an idea that an umpire, a person in a judicial position, has the power, and, I suppose, the duty, to call witnesses in a civil dispute, whom the parties do not either of them choose to call. In my opinion there is no such power. A judge has nothing to do with the getting up of a case."*

per Fletcher Moulton LJ at p.331

#### 58.9 ***Air Canada v. Secretary of State for Trade* [1983] 2 AC 395**

The British Airports Authority ("B.A.A."), a statutory body which owned and managed several airports including Heathrow airport, fixed the charges which airlines had to pay for using the airport. The B.A.A. embarked on a programme of major improvements which was originally to be financed in part from its reserve funds and in part from borrowing. However, the Secretary of State for Trade required the B.A.A. to finance the improvements from internal revenues. The B.A.A. accordingly imposed a 35 per cent increase in charges at Heathrow airport.

The plaintiffs, a group of international airlines, brought an action against the Secretary of State and the B.A.A. claiming, *inter alia*, declarations that the former had acted unlawfully and that the increase in charges imposed by the latter was excessive and illegal.

In order to investigate the Secretary of State's dominant purpose, the plaintiffs sought the production of certain documents, for which the Secretary of State claimed public interest immunity and certificates to that effect were signed by the permanent secretaries of the government departments concerned.

The judge, being provisionally inclined to order production of the category A documents, decided to inspect them first. Accordingly, he made an order for inspection but stayed the order pending an appeal.

The Court of Appeal allowed an appeal by the Secretary of State on the basis that it was not for the court to investigate the evidence on behalf of the litigants in order to discover the truth.

On appeal by the plaintiffs to the House of Lords:-

Held, dismissing the appeal, that where the Crown objected to the production of a class of documents on the ground of public interest immunity, the judge should not inspect the documents until he was satisfied that the documents contained material which would give substantial support to the contention of the party seeking disclosure on an issue which arose in the case, or which would assist any of the parties to the proceedings, and which was necessary for "disposing fairly of the cause or matter" within R.S.C., Ord. 24, r. 13 (1). Only if the judge were so satisfied, should he then examine the documents privately; and that since it was improbable that the documents for which immunity was sought in this case contained any material additional to the material that had already been published in the White Paper and the statement in the House of Commons, those documents were unlikely to be of assistance and accordingly they should not be inspected by the court.

#### **In the Court of Appeal: per Lord Denning MR (p.411)**

*"The due administration of justice does not always depend on eliciting the truth. It often depends on the burden of proof. Many times it requires the complainant to prove his case without any discovery from the other side."*

*"Where a man is charged with a crime - no matter how serious or how minor it may be - the prosecution must prove the case against him without any disclosure from him of any documents that he has. When a public authority is accused of any abuse or misuse of its power, or any non-performance of its public duties - in proceedings for mandamus or certiorari or under R.S.C., Ord. 53 - the accuser must make out his case without the help of any discovery save in most exceptional cases. No one has ever doubted the justice of those proceedings..."*

*"So I hold that when we speak of the due administration of justice this does not always mean ascertaining the truth of what happened. It often means that, as a matter of justice, a party must prove his case without any help from the other side. He must do it without discovery and without putting the other side into the witness box to answer questions."*

#### **In the House of Lords: per Lord Wilberforce (page 438)**

*"In a contest purely between one litigant and another, such as the present, the task of the court is to do, and be seen to be doing, justice between the parties - a duty reflected by the word "fairly" in the rule. There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done..."*

*"There is no independent power in the court to say that, nevertheless, it would like to inspect the documents, with a view to possible production, for its own assistance."*

#### **Should a judge be proactive during the trial?**

Whilst a judge is meant to be a relatively passive referee, he can clearly question witnesses and raise points with parties, particularly to tie up a loose end in the evidence, or to clarify what a witness meant.

However, the judge must be careful not to take over a cross-examination. It is not his function to conduct the trial, and it may be that an issue is being deliberately avoided by the parties for tactical reasons.

There is also a danger that a judge's mind may become biased by his own concentration on the case through his own prism.

The danger of a judge 'taking over' was highlighted in 1957, when Hallet J. resigned after being berated by the Court of Appeal (for a second time) for inappropriate interruptions during a cross-examination in *Jones v. National Coal Board* [1957] 2 QB 55.

**58.10 *Jones v. National Coal Board* [1957] 2 QB 55**

A coalminer working at the coal face was killed by a fall of roof. The widow brought an action for damages against the National Coal Board

At the trial of the action, Hallett J, intervened during the evidence for the plaintiff in order to understand the technicalities. During the evidence for the defendant board the judge intervened frequently, both during examination-in-chief and during cross-examination, at times conducting the examination of a witness himself, at times interrupting cross-examination to protect a witness against questions which he considered misleading, the nature and extent of his interventions being such as to break the sequence of question and answer.

He gave judgment for the board on all the matters in issue.

The plaintiff appealed against that decision on the ground, *inter alia*, that she had not had a fair trial.

Held that, though the judge was actuated by the best of motives, his interventions taken together were excessive and ill-timed, with the result that not sufficient primary facts had been elicited to enable the appellate court to determine the issues as to liability; and that there must therefore be a new trial.

*"No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence, he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases, and have done for centuries.*

*"Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large."* per Denning LJ at p.63

**To what extent do the Civil Procedure Rules require a judge to be pro-active?**

- 58.11 The Civil Procedure Rules require a relatively proactive approach from judges through imposing case management duties on them.
- 58.12 However, this proactivity applies principally to procedural issues leading up to the trial, in order to help reduce delays and minimize costs. It does not really impinge upon the judge's paramount function of determining the substantive issues of law and fact which divide the parties – i.e. the duties of the trial judge.

- 58.13 That said, the CPR has arguably moved the aim of the civil justice system from providing 'substantive justice' to achieving 'proportionate justice'. This is achieved in three main ways:
- i. More proactive judicial case management.
  - ii. Failure to comply with directions carries a risk of being debarred from presenting your case.
  - iii. The time and money devoted to any particular case is far more likely to be rationed than before.

### **What if a fair trial produces a 'wrong' result?**

It would be impossible to fashion a justice system which never produces a wrong result, but the idea that any judicial decision which could conceivably be wrong should be capable of being reconsidered at the suit of the losing party, must clearly be rejected.

Subject to appeals, the trial should bring the dispute to an end. Finality is an important aspect of certainty.

## **59 JUDICIAL BIAS**

### **A judge in your own cause**

59.1 It is a clear rule that a man may not be a judge in his own cause.

59.2 ***Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759**

The Lord Chancellor, Lord Cottenham, owned a substantial shareholding in the defendant canal which was an incorporated body.

In the action the Lord Chancellor sat on appeal from the Vice-Chancellor, whose judgment in favour of the company he affirmed. There was an appeal to the House of Lords on the grounds that the Lord Chancellor was disqualified. Their Lordships consulted the judges who advised that Lord Cottenham was disqualified from sitting as a judge in the cause because he had an interest in the suit.

This advice was unanimously accepted by their Lordships.

Note that there was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham to be biased and no inquiry as to the circumstances which led to Lord Cottenham sitting.

*"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest."* per Lord Campbell at p. 793

- 59.3 There are two types of case where the principle that 'a man may not be a judge in his own cause' has been interpreted.

### **An Interest in the Outcome of the Case**

First, it may be applied literally: if a judge is in fact a party to the litigation or has a financial, proprietary or other interest in its outcome then he is sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification.

### **Apparent Bias**

The second application of the principle is where a judge is not a party to the suit and does not have a tangible interest in its outcome, but in some other way his conduct or behaviour may give rise to the appearance that he is not impartial, for example because of his friendship with a party.

This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.<sup>45</sup>

### **Automatic disqualification for a judge with an interest in the outcome**

- 59.4 If a judge has an interest in the outcome of a case, he cannot sit as a judge on it. The interest will usually be financial, but may be to do with his moral beliefs or his support for a cause.

- 59.5 It is immaterial whether or not he might reasonably be supposed to have actually been biased in the circumstances. The mere fact of his interest is sufficient to disqualify him.

- 59.6 ***R. v. Bow Street Met. Stipendiary Magistrates ex parte Pinochet* [2000] 1 AC 119**

Senator Pinochet, the murderous former Head of State of Chile, was arrested on a visit to London, and arrested under an international warrant of arrest issued by a Spanish court.

The Divisional Court quashed the warrant on the basis that as a former Head of State, Pinochet was immune from arrest and extradition proceedings in the UK in respect of acts done whilst he was the Head of State, though the quashing of the warrant was stayed pending an appeal to the House of Lords.

Before the hearing in the House of Lords, Amnesty International obtained leave to intervene in the appeal and was represented by counsel.

The House of Lords upheld the appeal by the prosecuting authorities, holding that the warrant was valid, by a majority of 3 to 2.

However, one of the majority was Lord Hoffmann, who it was later revealed had some links with Amnesty International, being a director and chairperson of Amnesty International Charity Ltd, a charity which undertakes the charitable aspect of the work of AI. There was also a link through Lady Hoffmann, who worked at the international secretariat of AI.

Pinochet petitioned to have the decision set aside on the ground of apparent bias.

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<sup>45</sup> *Reg v. Bow Street Magistrates, ex parte Pinochet*. [2000] 1 AC 119, 132 (Lord Browne-Wilkinson).

HELD: Even though there was no suggestion that Lord Hoffmann had been guilty of bias of any kind, the decision would be set aside as he was disqualified as a matter of law automatically from sitting on a judicial panel to decide this matter.

### **Disqualification is automatic**

*"In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure."*<sup>46</sup>

### **The interest need not be a financial one.**

*"My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case."*

*"But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties"*<sup>47</sup>

### **The actual bias of the judge (or lack of it) is irrelevant.**

*"Disqualification is automatic and does not depend in any way on an implication of bias... I do, however, wish to make it clear (if I have not already done so) that my decision is not that Lord Hoffmann has been guilty of bias of any kind: he was disqualified as a matter of law automatically by reason of his directorship of A.I.C.L., a company controlled by a party, A.I."*<sup>48</sup>

### **Apparent Bias**

- 59.7 A judge ought to recuse himself even if he has no interest in the outcome of the case, if there is otherwise a reasonable apprehension that he might nonetheless be perceived as being biased towards one party or the other.
- 59.8 There has been some difference in judicial opinion as to the correct test for apparent bias. The test laid down by the House of Lords in *R. v. Gough* [1993] AC 646 ran as follows:
- "If, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand."* per Lord Goff at p.668
- 59.9 However, following criticism of this test as being out-of-step with Strasbourg jurisprudence, a modification was proposed by the Court of Appeal in 2001<sup>49</sup>, and adopted by the House of Lords in *Porter v. Magill* [2002] 2 AC 357

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<sup>46</sup> *ibid* at p.133.

<sup>47</sup> *ibid* at p.135.

<sup>48</sup> *ibid* at p.135.

<sup>49</sup> *Re Medicaments and related Classes of Drugs (No 2)* [2001] ICR 564.

59.10 **Porter v. Magill [2002] 2 AC 357**

*"The Court of Appeal took the opportunity in In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711a-b, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in R v Gough had not commanded universal approval.*

*"At p 711b-c he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review R v Gough to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence.*

*"Having conducted that review he summarised the court's conclusions, at pp 726-727: "85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in R v Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased." per Lord Hope at p.494*

59.11 This test was adopted both by the House of Lords in that case, and again in *Lawal v. Northern Spirit* [2003] ICR 856.

59.12 **Lawal v. Northern Spirit [2003] ICR 856**

An employment tribunal dismissed the applicant's complaint of race discrimination and victimisation against his former employers, holding that since the alleged discriminatory act had occurred after the termination of the employment relationship it had no jurisdiction to hear his claim.

On appeal by the applicant the employers were represented by counsel who was also a recorder and in that capacity had sat as a part-time judge in the Employment Appeal Tribunal with one of the two lay members of the appeal tribunal panel. The applicant raised a procedural objection to the appearance of the recorder as counsel before the appeal tribunal, relying on the right to an "independent and impartial tribunal" in article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and on the common law and contending that there was a real possibility of bias.

The appeal was adjourned and relisted for hearing before the President of the Employment Appeal Tribunal and two lay members neither of whom had sat with the recorder. The Employment Appeal Tribunal ruled that, applying the test of the fair-minded and informed observer who had considered the facts, there had been no possibility of bias. It dismissed the substantive appeal on the ground of lack of jurisdiction. The Court of Appeal by a majority dismissed the applicant's appeal on the issue of bias.

On appeal by the applicant it was held, allowing the appeal, that if counsel appeared before a panel of the Employment Appeal Tribunal that included one or two lay members with whom he had previously sat as a part-time judge a fair-minded and informed observer might conclude that there was a real possibility of such lay members being subconsciously biased in favour of counsel's submissions; that public confidence in the system was thereby undermined and the practice permitting such appearance should be discontinued; and that



it should be declared that the applicant had been entitled to succeed on the issue of bias and the matter remitted to the Court of Appeal for a ruling on the issue of jurisdiction.

*“The House unanimously endorsed this proposal. In the result there is now no difference between the common law test of bias and the requirements under article 6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context. The small but important shift approved in Porter v Magill [2002] 2 AC 357 has at its core the need for “the confidence which must be inspired by the courts in a democratic society...”*

*“Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53, by Kirby J when he stated that “a reasonable member of the public is neither complacent nor unduly sensitive or suspicious”.*

per Lord Steyn at p.862

**59.13 *Locabail (UK) Ltd. v. Bayfield Properties Ltd. [2000] QB 451 (CA)***

In this pre-*Porter v. Magill* case, five appeals were heard together, each on the subject of judicial bias. The Court of Appeal confirmed the following principles:

Where a judge had a direct personal interest, which was other than de minimis, in the outcome of proceedings bias was presumed to exist and he was automatically disqualified from hearing or continuing to hear the case and any judgment he had given would be set aside. Such disqualification arose irrespective of the judge's state of knowledge as to his interest; but a party with an irresistible right to object to his hearing or continuing to hear the case might waive that right so long as he did so in clear and unequivocal terms and with full knowledge of the relevant facts.

Where apparent bias was asserted it was for the reviewing court, personifying the reasonable man with knowledge of the relevant circumstances and adopting a broad approach, to assess whether there was a real danger of bias. In making that assessment the court might properly inquire whether the judge knew of the matter relied on as undermining his impartiality, since ignorance would preclude its having influenced his mind and dispel any such danger.

**59.14 *Howell v. Lees Millais [2007] EWCA Civ 720***

Where a judge had had personal dealings with a partner in a firm of solicitors in relation to him joining the firm, which had ended acrimoniously, and was then due to hear a Beddoe application in which another partner in the firm was involved, the test for apparent bias was made out and the judge should have recused himself.

**59.15 *Harb v. Aziz [2016] EWCA Civ 556***

Janan Harb alleged that she had married the King of Saudi Arabia, and that after their separation, he had orally contracted to give her £12 million. The case was defended by the late king's son, Prince Abdul Aziz.

*Inter alia*, the Prince claimed that the judge, Peter Smith J, showed apparent bias against him. This was based on the fact that the judge had had a written altercation with a member of Blackstone's Chambers, who had written an article in The Times, which was extremely critical of the judge's behaviour relating to a holiday where he lost his luggage. The judge

sent a vitriolic letter to the Heads of Chambers, saying that he never wished to be associated with the Chambers again.

The Prince alleged that it is indicated that the judge would be biased against his case, because his counsel was also a member of Blackstones. The Court of Appeal was not convinced.

*"We are prepared to assume that the informed and fair-minded observer, knowing of the Article, would conclude that there was a real possibility that the judge was biased against all members of Blackstone Chambers, at least for a short period after the publication of the Article. But for the reasons we have given, the observer would not conclude without more that there was a real possibility that this bias would affect the judge's determination of the issues in a case in which a party was represented by a member of Blackstone Chambers."*

*"But there is a further reason why this ground of appeal must fail. The assessment of whether an informed and fair-minded observer, having considered the facts, would conclude that there was a real possibility of bias depends on an examination of all the relevant facts. It is fact sensitive. In our view, the facts in the present case show that the possibility that Peter Smith J was actuated by bias against the Prince is unrealistic."*

per Lord Dyson, MR at paras 74 and 75

### **Bias by a member of the jury**

59.16 The same rules apply to potential bias by members of the jury. Whilst they should certainly not serve if they know any of the litigants, it may be safe for them to hear a case when their only connection is an association with one of the witnesses.

### **59.17 *Pullar v. UK* [1996] SCCR 755**

Robert Pullar, a member of Tayside Regional Council, was convicted of corruption in public office, in that he had offered, in exchange for money from John McLaren, to vote in favour of a planning application. McLaren was one of the key prosecution witnesses.

One of the members of the 15-person jury at Perth Sheriff Court, was Brian Forsyth, a junior employee in McLaren's firm. McLaren realized this before he gave evidence, and alerted the clerk of the court, but the clerk, without consulting the sheriff, took the view that there was no need to take any action.

Pullar appealed to the High Court against his conviction on the basis that the juryman Forsyth was biased towards believing the prosecution witness. When he was unsuccessful, he applied to the ECHR on the ground that he had been denied a fair trial.

HELD: By a majority, that in the circumstances, the trial had been fair, despite the connection between the witness and the juryman. It was by no means decisive that the sheriff would probably have dismissed F from the jury had he known of his connection with M. It does not necessarily follow from the fact that a member of a tribunal has some personal knowledge of one of the witnesses that he will be prejudiced in favour of his testimony. It was by no means clear on the facts that an objective observer would conclude that F would have been more inclined to believe M rather than the defence witnesses.

The tribunal offered a number of important safeguards: F was only one of fifteen jurors; the sheriff gave directions to the jury that they should dispassionately assess the credibility of the witnesses; and they all swore an oath to similar effect; and against this background the applicant's misgivings about the impartiality of the tribunal could not be regarded as objectively justified.

## 60 JUDICIAL PREJUDICE IN RESOLVING A FACTUAL DISPUTE

### **Bias based on personal feelings**

- 60.1 When there is contradictory evidence from the parties, it might be difficult to resolve these differences and to decide which party to believe.
- 60.2 Judges should be wary of their inherent prejudices, which might be based, for example, on the physical appearance of the witnesses.
- 60.3 The important thing is that judges are aware as they can be of any biases or prejudices from which they might suffer, and acknowledge and take account of these when evaluating witnesses and their evidence.

*“The fact that we cannot get the answer right every time is no excuse for not doing our best to get the right answer.”<sup>50</sup>*

## 61 JUDICIAL PREJUDICE IN RESOLVING A LEGAL DISPUTE

### **Judges must not adapt the law to suit the desired outcome**

- 61.1 Judges are sometimes tempted to ‘bend’ the law, if the strict application would appear to lead to an unmeritorious result in a particular case.
- 61.2 Of course, they must never do this! Not only would it be contrary to judicial duty – and the judicial oath – but is likely to be counter-productive, as the losing party would successfully appeal, and end up paying two sets of costs.

## 62 CLARITY AND CERTAINTY IN JUDGMENTS

### **The need for clarity**

- 62.1 As judgments may set precedents, it is important that they are based on the merits of the case, as prescribed by law.
- 62.2 The rationale for judgments must also be clear to enable the litigants to understand why they have won or lost, especially if they wish to take the matter further.

### ***Harb v. Aziz* [2016] EWCA Civ 556**

*“Our system of civil justice has developed a tradition of delivering judgments that describe the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. This requires that a judgment demonstrates that the essential issues that have been raised by the parties have been addressed by the court and how they have been resolved. In a case (such as this) which largely turns on oral evidence and where the credibility of the evidence of a main witness is challenged on a number of grounds, it is necessary for the court to address at least the principal grounds. A failure to do so is likely to undermine the fairness of the trial.*

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<sup>50</sup> Lord Neuberger, *passim*, para 17

*“The party who has raised the grounds of challenge can have no confidence that the court has considered them at all; and he will have no idea why, despite his grounds of challenge, the evidence has been accepted. That is unfair and is not an acceptable way of deciding cases.”* per Lord Dyson MR at para 39

- 62.3 It is also essential, if a judge is developing an unfair or out-of-date law, to admit this to himself and to explain in his judgment that he is developing the law, and how and why he is doing it. He must be – and be seen to be – intellectually honest.

## **63 DISSENTING JUDGMENTS**

### **Should appellate decisions be unanimous if possible?**

- 63.1 An ethical issue which can arise for common law appellate judges is whether they are obliged to dissent even in a case where they do not feel very strongly and where they feel that a dissent will be of no value in practice.
- 63.2 Some judges feel that they would not be true to their judicial oath if they did not record a dissent in such a case. Others feel that their collegiate function entitles – or even obliges – them to go along with the majority, even if they disagree. There is no correct answer! Each judge must make up his or her own mind.

# APPENDIX A: PRIMARY SOURCE MATERIALS

The following primary source materials represent a range of the different subject areas with which the courts deal. Most of these are cases which have been referenced in the main text to this manual, but we have included a few others which are of general interest, especially in illustrating the way in which public policy underlies many judicial decisions.

1. *Adler v. George* [1964] 2 QB 7
2. *Builders' Skip Case* (1986)
3. *Regina v. Brown (Anthony)* [1994] 1 AC 212
4. *Carlill v. The Carbolic Smoke Ball Company* [1892] 2 QB 484 (High Court)
5. *Carlill v. The Carbolic Smoke Ball Company* [1892] 2 QB 484 (Court of Appeal)
6. *Fisher v. Bell* [1960] 3 WLR 919
7. *Hammond v. Mitchell* [1991] 1 WLR 1127
8. *Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.* [1964] AC 465
9. *Hinz v. Berry* [1970] 2 QB 40
10. *Regina (Jackson and others) v. Attorney General* [2006] 1 AC 262
11. *Partridge v. Crittenden* [1968] 1 WLR 1204
12. *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.* [1953] 1 QB 401
13. *Smith v. Hughes* [1960] 1 WLR 830
14. *Whiteley v. Chappell* (1868-69) LR 4 QB 147
15. The Noise Act 1996 (as amended)
16. The European Convention on Human Rights

## 1. ***Adler v. George* [1964] 2 QB 7: Divisional Court of the QBD**

Divisional Court: Lord Parker C.J. , Paull and Widgery JJ.: 1964 Jan. 30

The defendant, who had obtained access to a Royal Air Force station, a prohibited place within the meaning of the Official Secrets Act, 1920 , was actually within its boundaries when he obstructed a member of Her Majesty's forces engaged in security duty in relation to the station. He was charged with having in the vicinity of a prohibited place obstructed a member of Her Majesty's forces engaged in security duty in relation to the prohibited place, contrary to section 3 of the Act of 1920. <sup>1</sup>He contended that, as he was actually in the prohibited place, he could not be said to be in the vicinity of the prohibited place. He was convicted. On appeal:-

Held, dismissing the appeal, that on the true construction of section 3 of the Official Secrets Act, 1920 , the words "in the vicinity of" were to be read as "in or in the vicinity of"; and that, accordingly, the defendant had committed the offence charged.

CASE STATED by Norfolk Justices sitting at Downham Market.

On May 24, 1963, an information was preferred by Albert George, a superintendent of police, against Frank Adler, the defendant, that he on May 11, 1963, at the Parish of Marham in the county of Norfolk in the vicinity of a prohibited place, namely, Marham Royal Air Force station, obstructed a member of Her Majesty's forces engaged in security duty in relation to the prohibited place, contrary to sections 3 and 8 (2) of the Official Secrets Act, 1920 .

The justices found the following facts: Marham Royal Air Force station was, at all material times, a prohibited place within the meaning of the Act of 1920. The defendant was, on May 11, 1963, actually within the boundaries of the station, and when within the boundaries of the station, obstructed a member of Her Majesty's Royal Air Force who was engaged, at the material time, on security duty at and in relation to the station.

It was contended by the defendant that because the charge referred to obstruction at Marham in the vicinity of a prohibited place, namely, Marham Royal Air Force station, and the evidence for the prosecution dealt with obstruction which took place when he was actually in the prohibited place, there was no evidence to support the charge.

It was contended by the prosecutor that the defendant, being actually within the boundaries of the station at the material time, was in the vicinity of a prohibited place within the meaning of the Act.

The justices were of the opinion that the defendant had obstructed a member of Her Majesty's Royal Air Force in the vicinity of a prohibited place in that, in their view, section 3 of the Official Secrets Act, 1920 , made it an offence for any person to obstruct a member of Her Majesty's forces engaged on security duty in relation to the prohibited place when such obstruction occurred not only outside and near to the prohibited place but also when such obstruction took place actually within the confines of the prohibited place. Accordingly, they convicted the defendant and fined him £25 and ordered him to pay £3 3s. towards the costs of the prosecution and bound him over in the sum of £50 to keep the peace and to be of good behaviour for a period of 12 months. They gave the defendant three months in which to pay the fine and in default of payment sentenced him to two months' imprisonment.

The defendant appealed.

The defendant in person. The justices were wrong, since the acts proved occurred on the station, and the offence charged related to something occurring in the vicinity of the station, and "in the vicinity of" means "near" or "close to," and does not mean "in" or "on." The term "in the vicinity of" is not defined in the Official Secrets Act, 1920 , and the natural or popular and accepted meaning of "vicinity" which has to be applied is to be found in the general dictionaries, such as the Oxford

English Dictionary and others. In the heading to section 27 of the Civil Aviation Act, 1949 , it is made clear that "near" is the meaning to be attached in that section to the word "vicinity." On the facts, the prosecution could have been brought only under section 193 of the Air Force Act, 1955 , and no offence was committed against section 3 of the Official Secrets Act, 1920 . There is a casus omissus.

**Gerald Draycott** for the prosecutor. The justices' decision was right. There is no direct authority, but it is submitted that, since the defendant could be on only one part of the station at a time, he was in the vicinity of all the other parts of the station at that time. The meaning of "in the vicinity of," in the context of the Official Secrets Act, 1920 , is wide enough to cover what the defendant was found to have done in this case; to hold otherwise would be to produce extraordinary results.

#### **LORD PARKER C.J.**

This is an appeal by way of case stated from a decision of justices for the county of Norfolk sitting at Downham Market who convicted the defendant of an offence contrary to section 3 of the Official Secrets Act, 1920 , in that, in the vicinity of a prohibited place, namely, Marham Royal Air Force station, he obstructed a member of Her Majesty's Forces engaged in security duty in relation to the said prohibited place.

Section 3 provides that: "No person in the vicinity of any prohibited place shall obstruct, knowingly mislead or otherwise interfere with or impede, the chief officer or a superintendent or other officer of police, or any member of His Majesty's forces engaged on guard, sentry, patrol, or other similar duty in relation to the prohibited place, and, if any person acts in contravention of, or fails to comply with, this provision, he shall be guilty of a misdemeanour." In the present case the defendant had obtained access to - it matters not how - and was on the Air Force station on May 11, 1963, and there and then, it was found, he obstructed a member of Her Majesty's Royal Air Force.

The sole point here, and a point ably argued by the defendant, is that if he was on the station he could not be in the vicinity of the station, and it is only an offence under this section to obstruct a member of Her Majesty's Forces while he is in the vicinity of the station. The defendant has referred to the natural meaning of "vicinity," which I take to be, quite generally, the state of being near in space, and he says that it is inapt to and does not cover being in fact on the station as in the present case.

I am quite satisfied that this is a case where no violence is done to the language by reading the words "in the vicinity of" as meaning "in or in the vicinity of." Here is a section in an Act of Parliament designed to prevent interference with members of Her Majesty's forces, among others, who are engaged on guard, sentry, patrol or other similar duty in relation to a prohibited place such as this station. It would be extraordinary, I venture to think it would be absurd, if an indictable offence was thereby created when the obstruction took place outside the precincts of the station, albeit in the vicinity, and no offence at all was created if the obstruction occurred on the station itself. It is to be observed that if the defendant is right, the only offence committed by him in obstructing such a member of the Air Force would be an offence contrary to section 193 of the Air Force Act, 1955 , which creates a summary offence, the maximum sentence for which is three months, whereas section 3 of the Official Secrets Act, 1920 , is, as one would expect, dealing with an offence which can be tried on indictment and for which, under section 8 , the maximum sentence of imprisonment is one of two years. There may be, of course, many contexts in which "vicinity" must be confined to its literal meaning of "being near in space" but under this section, I am quite clear that the context demands that the words should be construed in the way I have said. I would dismiss this appeal.

## 2. The judgment in the *Builder's Skip Case* (1986)

**Russell L.J.:** This is an application for judicial review by Waste Management Limited, the relief sought being *certiorari* to quash the conviction of the company by the justices sitting at Worthing on March 17, 1987. The company had been charged with a series of offences under the Highways Act 1980. This court is concerned with only one of the convictions that were recorded, namely, a conviction of an offence under s. 140 on the Act.

The background to the case can be very shortly stated because the facts are really simplicity itself. The applicant company is engaged in the business of hiring out building skips to organizations involved in the construction industry. At the material time, namely May 1986, they had hired out a building skip to an organization, having first obtained permission for the skip to be deposited on the highway in New Road, Durrington. Unhappily it seems that the skip was inadequately lighted so that during the hours of darkness, shortly before midnight on June 1, 1986, a motor vehicle collided with this obstruction in the highway. The matter was reported to the police and late at night on June 1 a police officer on duty at Worthing police station telephoned the applicant's business manager at his home. The business manager, Mr. Kidson, was required by the officer to remove the skip. That seems to have been a difficult operation for Mr. Kidson, and in the event the skip was not removed until the following day. Accordingly, one of the charges preferred against Mr. Kidson's employers was made under s.140(3). I read the first three subsections of s.140:

'(1) The following provisions of this section have effect in relation to a builder's skip deposited on a highway notwithstanding that it was deposited on it in accordance above.'

I interpose to say that this case falls fairly and squarely within the provision of subs. (1). Subsection (2) reads:

'(2) The highway authority for the highway or a constable in uniform may require the owner of the skip to remove or reposition it or cause it to be removed or repositioned.

'(3) A person required to remove or reposition, or cause to be removed or repositioned, a skip under a requirement made by virtue of subs. (2) above shall comply with the requirement as soon as practicable, and if he fails to do so he is guilty of an offence and liable to a fine not exceeding ...'

The short point taken here by counsel on behalf of the applicant, Mr. Ashwell, to whom I am indebted for his clear and succinct submissions, is that the prosecution failed to bring itself within the terms of subs.(2) when that subsection is properly construed. It has to be observed that the point was not taken before the justices. Another point was taken which did not have any merit and in relation to which leave to move for judicial review was refused.

However, when the application was renewed before the Divisional Court, leave was given to take the point which is now taken by Mr. Ashwell. It can be stated very shortly. His submission is that subs. (2) provides that a request to remove a skip must either be made by a highway authority or by, quoting the words of the subsection, 'a constable in uniform'. It is not enough, submits counsel, for a constable, either in or not in uniform, to make the request save by way of personal confrontation face to face with the potential offender. The reason for the provision, submits counsel, is to protect the potential offender from those who may be irritated by the presence of the skip in the highway and who may be tempted to invite its removal when having no authority to do so and in the face of permission earlier granted by the local authority. Effect must be given to the plain meaning of the words and to the purpose for which this penal provision in the Act is drafted, so submits counsel.

For my part I can see the force of the submissions and it is an unhappy feature of the case that they were not made to the justices. In those circumstances it is understandable, though I regret to say legally indefensible, that the justices should have convicted. In so doing, in my judgment, they



were wrong. Effect must be given to the plain words of the statute and it would be quite wrong not to give effect to them in the way that I have endeavoured to indicate.

Accordingly in my judgment on this occasion the justices did err in convicting Waste Management Limited of the offence under s.140(2), because the justices had no evidence before them indicating that the terms of subs.(2) when properly construed had been complied with by the police authority.

It seems that in appropriate circumstances there are two alternatives open to the police when they wish an obstruction to be removed. They can either invite the highway authority who originally gave permission to make the request or they can do it themselves. But, if they choose to do it themselves, then they must do it by a constable in uniform going to the potential offender and telling him to remove the obstruction. If they fail to take one or other of those courses then the terms of the Act are not complied with by the authorities.

It seems to me therefore that I am left with no alternative but to accede to this application and to quash this conviction.

### 3. ***Regina v. Brown (Anthony)* [1994] 1 AC 212: House of Lords**

The appellants, a group of sado-masochists, willingly and enthusiastically participated in the commission of acts of violence against each other for the sexual pleasure it engendered in the giving and receiving of pain. They pleaded not guilty on arraignment to counts charging various offences under sections 20 and 47 of the Offences against the Person Act 1861, relating to the infliction of wounds or actual bodily harm on genital and other areas of the body of the consenting victim. On a ruling by the trial judge that, in the particular circumstances, the prosecution did not have to prove lack of consent by the victim, the appellants were re-arraigned, pleaded guilty, some to offences under section 20 and all to offences under section 47 and they were convicted. They appealed against conviction on the ground that the judge had erred in his rulings, in that the willing and enthusiastic consent of the victim to the acts on him prevented the prosecution from proving an essential element of the offence, whether charged under section 20 or section 47 of the Act of 1861; the Court of Appeal (Criminal Division) dismissed the appeal.

On appeal by the appellants:-

Held, dismissing the appeals (Lord Mustill and Lord Slynn of Hadley dissenting), that although a prosecutor had to prove absence of consent in order to secure a conviction for mere assault it was not in the public interest that a person should wound or cause actual bodily harm to another for no good reason and, in the absence of such a reason, the victim's consent afforded no defence to a charge under section 20 or 47 of the Act of 1861; that the satisfying of sado-masochistic desires did not constitute such a good reason; and that, since by their pleas some appellants had admitted wounding and all had admitted causing hurt or injury calculated to interfere with the health or comfort of the other party and since such injuries were neither transient nor trifling, the question of consent was immaterial and the judge's ruling had, accordingly, been correct

#### **OPINION OF LORD TEMPLEMAN**

My Lords, the appellants were convicted of assaults occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861. Three of the appellants were also convicted of wounding contrary to section 20 of the Act of 1861. The incidents which led to each conviction occurred in the course of consensual sado-masochistic homosexual encounters. The Court of Appeal upheld the convictions and certified the following point of law of general public importance: "Where A wounds or assaults B occasioning him actual bodily harm in the course of a sado-masochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 or section 47 of the Offences against the Person Act 1861?"

The definition of assault set forth in the 14th Report of the Criminal Law Revision Committee on Offences against the Person (1980) (Cmnd. 7844), para. 158, and adopted by the Law Commission in their Consultation Paper No. 122 (1992), paragraph 9.1 is as follows: "At common law, an assault is an act by which a person intentionally or recklessly causes another to apprehend immediate and unlawful personal violence and a battery is an act by which a person intentionally or recklessly inflicts personal violence upon another. However, the term 'assault,' is now, in both ordinary legal usage and in statutes, regularly used to cover both assault and battery."

There are now three types of assault in ascending order of gravity, first common assault, secondly assault which occasions actual bodily harm and thirdly assault which inflicts grievous bodily harm.

By section 39 of the Criminal Justice Act 1988: "Common assault and battery shall be summary offences and a person guilty of either of them shall be liable to a fine . . . to imprisonment for a term not exceeding six months, or to both."

By section 47 of the Act of 1861, as amended: "Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . [to a maximum penalty of five years imprisonment]."

In *Rex v. Donovan* [1934] 2 K.B. 498 Swift J. delivering the judgment of the Court of Criminal Appeal said, at p. 509: "'bodily harm' has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling."

In the present case each appellant pleaded guilty to an offence under this section when the trial judge ruled that consent of the victim was no defence.

By section 20 of the Act of 1861, as amended: "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of [an offence], . . . and shall be liable . . . [to a maximum penalty of five years imprisonment]."

To constitute a wound for the purposes of the section the whole skin must be broken and not merely the outer layer called the epidermis or the cuticles: see *J.J.C. (A Minor) v. Eisenhower* [1983] 3 All E.R. 230.

"Grievous bodily harm" means simply bodily harm that is really serious and it has been said that it is undesirable to attempt a further definition: see *Director of Public Prosecutions v. Smith* [1961] A.C. 290.

In section 20 the words "unlawfully" means that the accused had no lawful excuse such as self-defence. The word "maliciously" means no more than intentionally for present purposes: see *Reg. v. Mowatt* [1968] 1 Q.B. 421.

Three of the appellants pleaded guilty to charges under section 20 when the trial judge ruled that the consent of the victim afforded no defence.

In the present case each of the appellants intentionally inflicted violence upon another (to whom I refer as "the victim") with the consent of the victim and thereby occasioned actual bodily harm or in some cases wounding or grievous bodily harm. Each appellant was therefore guilty of an offence under section 47 or section 20 of the Act of 1861 unless the consent of the victim was effective to prevent the commission of the offence or effective to constitute a defence to the charge.

In some circumstances violence is not punishable under the criminal law. When no actual bodily harm is caused, the consent of the person affected precludes him from complaining. There can be no conviction for the summary offence of common assault if the victim has consented to the assault. Even when violence is intentionally inflicted and results in actual bodily harm, wounding or serious bodily harm the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating. Surgery involves intentional violence resulting in actual or sometimes serious bodily harm but surgery is a lawful activity. Other activities carried on with consent by or on behalf of the injured person have been accepted as lawful notwithstanding that they involve actual bodily harm or may cause serious bodily harm. Ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities.

In earlier days some other forms of violence were lawful and when they ceased to be lawful they were tolerated until well into the 19th century. Duelling and fighting were at first lawful and then tolerated provided the protagonists were voluntary participants. But where the results of these activities was the maiming of one of the participants, the defence of consent never availed the aggressor; see *Hawkins' Pleas of the Crown*, 8th ed. (1824) 1 Ch. 15. A maim was bodily harm whereby a man was deprived of the use of any member of his body which he needed to use in order to fight but a bodily injury was not a maim merely because it was a disfigurement. The act of

maim was unlawful because the King was deprived of the services of an able-bodied citizen for the defence of the realm. Violence which maimed was unlawful despite consent to the activity which produced the maiming. In these days there is no difference between maiming on the one hand and wounding or causing grievous bodily harm on the other hand except with regard to sentence.

When duelling became unlawful, juries remained unwilling to convict but the judges insisted that persons guilty of causing death or bodily injury should be convicted despite the consent of the victim. Similarly, in the old days, fighting was lawful provided the protagonists consented because it was thought that fighting inculcated bravery and skill and physical fitness. The brutality of knuckle fighting however caused the courts to declare that such fights were unlawful even if the protagonists consented. Rightly or wrongly the courts accepted that boxing is a lawful activity.

In *Reg. v. Coney* (1882) 8 Q.B.D. 534, the court held that a prize-fight in public was unlawful. Cave J. said, at p. 539: "The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial."

Stephen J. said, at p. 549: "When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults. . . . In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football, and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances."

Hawkins J. said, at p. 553: "whatever may be the effect of a consent in a suit between party and party, it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution. In other words, though a man may by consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public for the maintenance of good order; . . . He may compromise his own civil rights, but he cannot compromise the public interests."

Lord Coleridge C.J. said, at p. 567: ". . . I conceive it to be established, beyond the power of any argument however ingenious to raise a doubt, that as the combatants in a duel cannot give consent to one another to take away life, so neither can the combatants in a prize-fight give consent to one another to commit that which the law has repeatedly held to be a breach of the peace. An individual cannot by such consent destroy the right of the Crown to protect the public and keep the peace."

The conclusion is that a prize-fight being unlawful, actual bodily harm or serious bodily harm inflicted in the course of a prize-fight is unlawful notwithstanding the consent of the protagonists.

In *Rex v. Donovan* [1934] 2 K.B. 498 the appellant in private beat a girl of 17 for purposes of sexual gratification, it was said with her consent. Swift J. said, at p. 507: "it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial."

In *Attorney-General's Reference (No. 6 of 1980)* [1981] Q.B. 715 where two men quarrelled and fought with bare fists Lord Lane C.J., delivering the judgment of the Court of Appeal, said, at p. 719: "it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/caused. This means that most fights will be unlawful regardless of consent. Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases."

Duelling and fighting are both unlawful and the consent of the protagonists affords no defence to charges of causing actual bodily harm, wounding or grievous bodily harm in the course of an unlawful activity.

The appellants and their victims in the present case were engaged in consensual homosexual activities. The attitude of the public towards homosexual practices changed in the second half of this century. Change in public attitudes led to a change in the law.

The Wolfenden Report (Report of the Committee on Homosexual Offences and Prostitution (1957) (Cmnd. 247)) declared that the function of the criminal law in relation to homosexual behaviour "is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence:" paragraph 13 of chapter 2.

In response to the Wolfenden Report and consistently with its recommendations, Parliament enacted section 1 of the Sexual Offences Act 1967 which provided, inter alia, as follows: "(1) Notwithstanding any statutory or common law provision . . . a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of 21 years. (2) An act which would otherwise be treated for the purposes of this Act as being done in private shall not be so treated if done - (a) when more than two persons take part or are present; . . . (6) It is hereby declared that where in any proceedings it is charged that a homosexual act is an offence the prosecutor shall have the burden of proving that the act was done otherwise than in private or otherwise than with the consent of the parties or that any of the parties had not attained the age of 21 years. (7) For the purposes of this section a man shall be treated as doing a homosexual act if, and only if, he commits buggery with another man or commits an act of gross indecency with another man or is a party to the commission by a man of such an act."

The offence of gross indecency was created by section 13 of the Sexual Offences Act 1956 in the following terms: "It is an offence for a man to commit an act of gross indecency with another man, whether in public or private, or to be a party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man."

By the Act of 1967, Parliament recognised and accepted the practice of homosexuality. Subject to exceptions not here relevant, sexual activities conducted in private between not more than two consenting adults of the same sex or different sexes are now lawful. Homosexual activities performed in circumstances which do not fall within section 1(1) of the Act of 1967 remain unlawful. Subject to the respect for private life embodied in the Act of 1967, Parliament has retained criminal sanctions against the practice, dissemination and encouragement of homosexual activities.

My Lords, the authorities dealing with the intentional infliction of bodily harm do not establish that consent is a defence to a charge under the Act of 1861. They establish that the courts have

accepted that consent is a defence to the infliction of bodily harm in the course of some lawful activities. The question is whether the defence should be extended to the infliction of bodily harm in the course of sado-masochistic encounters. The Wolfenden Committee did not make any recommendations about sado-masochism and Parliament did not deal with violence in 1967. The Act of 1967 is of no assistance for present purposes because the present problem was not under consideration.

The question whether the defence of consent should be extended to the consequences of sado-masochistic encounters can only be decided by consideration of policy and public interest. Parliament can call on the advice of doctors, psychiatrists, criminologists, sociologists and other experts and can also sound and take into account public opinion. But the question must at this stage be decided by this House in its judicial capacity in order to determine whether the convictions of the appellants should be upheld or quashed.

Counsel for some of the appellants argued that the defence of consent should be extended to the offence of occasioning actual bodily harm under section 47 of the Act of 1861 but should not be available to charges of serious wounding and the infliction of serious bodily harm under section 20. I do not consider that this solution is practicable. Sado-masochistic participants have no way of foretelling the degree of bodily harm which will result from their encounters. The differences between actual bodily harm and serious bodily harm cannot be satisfactorily applied by a jury in order to determine acquittal or conviction.

Counsel for the appellants argued that consent should provide a defence to charges under both section 20 and section 47 because, it was said, every person has a right to deal with his body as he pleases. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be made. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as dangerous and injurious to individuals and which if allowed and extended is harmful to society generally. In any event the appellants in this case did not mutilate their own bodies. They inflicted bodily harm on willing victims. Suicide is no longer an offence but a person who assists another to commit suicide is guilty of murder or manslaughter.

The assertion was made on behalf of the appellants that the sexual appetites of sadists and masochists can only be satisfied by the infliction of bodily harm and that the law should not punish the consensual achievement of sexual satisfaction. There was no evidence to support the assertion that sado-masochist activities are essential to the happiness of the appellants or any other participants but the argument would be acceptable if sado-masochism were only concerned with sex, as the appellants contend. In my opinion sado-masochism is not only concerned with sex. Sado-masochism is also concerned with violence. The evidence discloses that the practices of the appellants were unpredictably dangerous and degrading to body and mind and were developed with increasing barbarity and taught to persons whose consents were dubious or worthless.

A sadist draws pleasure from inflicting or watching cruelty. A masochist derives pleasure from his own pain or humiliation. The appellants are middle-aged men. The victims were youths some of whom were introduced to sado-masochism before they attained the age of 21. In his judgment in the Court of Appeal, Lord Lane C.J. said that two members of the group of which the appellants formed part, namely one Cadman and the appellant Laskey: "were responsible in part for the corruption of a youth K. . . . It is some comfort at least to be told, as we were, that K. has now it seems settled into a normal heterosexual relationship. Cadman had befriended K. when the boy was 15 years old. He met him in a cafeteria and, so he says, found out that the boy was interested in homosexual activities. He introduced and encouraged K. in 'bondage affairs.' He was interested in viewing and recording on videotape K. and other teenage boys in homosexual scenes . . . One cannot overlook the danger that the gravity of the assaults and injuries in this type of case may escalate to even more unacceptable heights."

The evidence disclosed that drink and drugs were employed to obtain consent and increase enthusiasm. The victim was usually manacled so that the sadist could enjoy the thrill of power and the victim could enjoy the thrill of helplessness. The victim had no control over the harm which the sadist, also stimulated by drink and drugs might inflict. In one case a victim was branded twice on the thigh and there was some doubt as to whether he consented to or protested against the second branding. The dangers involved in administering violence must have been appreciated by the appellants because, so it was said by their counsel, each victim was given a code word which he could pronounce when excessive harm or pain was caused. The efficiency of this precaution, when taken, depends on the circumstances and on the personalities involved. No one can feel the pain of another. The charges against the appellants were based on genital torture and violence to the buttocks, anus, penis, testicles and nipples. The victims were degraded and humiliated sometimes beaten, sometimes wounded with instruments and sometimes branded. Bloodletting and the smearing of human blood produced excitement. There were obvious dangers of serious personal injury and blood infection. Prosecuting counsel informed the trial judge against the protests of defence counsel, that although the appellants had not contracted Aids, two members of the group had died from Aids and one other had contracted an H.I.V. infection although not necessarily from the practices of the group. Some activities involved excrement. The assertion that the instruments employed by the sadists were clean and sterilised could not have removed the danger of infection, and the assertion that care was taken demonstrates the possibility of infection. Cruelty to human beings was on occasions supplemented by cruelty to animals in the form of bestiality. It is fortunate that there were no permanent injuries to a victim though no one knows the extent of harm inflicted in other cases. It is not surprising that a victim does not complain to the police when the complaint would involve him in giving details of acts in which he participated. Doctors of course are subject to a code of confidentiality.

In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sado-masochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty and result in offences under sections 47 and 20 of the Act of 1861.

The appellants' counsel complained that some of the group's activities involved the appellants in offences of gross indecency which, happily for the appellants, became time barred before the police obtained video films made by members of the group of some of their activities. Counsel submitted that since gross indecency charges were time barred, the police acted unfairly when they charged the appellants with offences under the Act of 1861. But there was no reason for the police to refrain from pursuing the charges under the Act of 1861 merely because other charges could not be pursued. Indecency charges are connected with sex. Charges under the Act of 1861 are concerned with violence. The violence of sadists and the degradation of their victims have sexual motivations but sex is no excuse for violence.

The appellants' counsel relied, somewhat faintly, on article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That article so far as material provides that:

"1. No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

At the relevant time it was a criminal offence under English law to inflict actual bodily harm or worse. Counsel submitted that the appellants reasonably believed that consent was a defence. This was an ingenious argument for which there was no foundation in fact or principle and which in any event does not seem to me to provide a defence under article 7.

The appellants' counsel relied on article 8 of the Convention which is in these terms:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

It is not clear to me that the activities of the appellants were exercises of rights in respect of private and family life. But assuming that the appellants are claiming to exercise those rights I do not consider that article 8 invalidates a law which forbids violence which is intentionally harmful to body and mind.

Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised. I would answer the certified question in the negative and dismiss the appeals of the appellants against conviction.



#### 4. *Carlill v. The Carbolic Smoke Ball Company* [1892] 2 QB 484: High Court

##### Queen's Bench Division

4 July 1892

Hawkins J.

1892 June 18; July 4.

Gaming—Contract by way of Wagering—Insurance against Disease—8 & 9 Vict. c. 109—14 Geo. 3, c. 48, s. 2.

The defendants, the proprietors of a certain medical preparation called “The Carbolic Smoke Ball,” issued an advertisement in which they promised to pay £100 to any person who contracted the influenza after having used one of their smoke balls, in a certain specified manner and for a certain specified period. The plaintiff, upon the faith of the advertisement, purchased one of the defendants' smoke balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:—

Held, that the above facts established a contract by the defendants to pay the plaintiff £100 in the event which happened; that such contract was neither a contract by way of wagering within 8 & 9 Vict. c. 109, nor a policy within 14 Geo. 3, c. 48, s. 2; and that the plaintiff was entitled to recover.

FURTHER consideration before Hawkins J.

The defendants, who are the proprietors and vendors of a medical preparation called “The Carbolic Smoke Ball,” inserted in the Pall Mall Gazette of November 13, 1891, the following advertisement: “£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks, according to the printed directions supplied with each ball. £1,000 is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.

“During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

“One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s. post free. The ball can be refilled at a cost of 5s. Address:

“Carbolic Smoke Ball Company, “27, Princes Street, Hanover Square, London, W.”

The plaintiff, a lady, having read that advertisement, on the faith of it bought one of the defendants' carbolic smoke balls, and used it as directed three times a day, from November 20 till January 17, 1892, when she was attacked by influenza. She thereupon brought this action against the defendants to recover the £100 promised in their advertisement.

The defendants pleaded that there was no contract between the plaintiff and the defendants that the defendants should pay £100 in the event which happened; and that if there was such a contract it was void, either under 8 & 9 Vict. c. 109, as being a contract by way of wagering, or under 14 Geo. 3, c. 48, s. 2, as being a contract of insurance not made in accordance with the provisions of that section, or as being contrary to public policy. The action came on for trial before Hawkins, J., and a jury; but the facts not being in dispute, the learned judge reserved the case for further consideration on the points of law raised in the defence.

**Asquith, Q.C.** (Loehnis, with him), for the defendants. First, there was no contract between the parties. The advertisement was a mere representation of what the advertisers intended to do in a certain event. The defendants did not by issuing it mean to impose upon themselves any obligation enforceable by law. That this was so is shewn by the wide terms in which it is couched, for the reward is offered to anyone who contracts influenza "after having used the ball"; but they could not have meant to bind themselves to pay the money to persons who contracted the complaint years after they had ceased to use the ball. The case is not like the class of cases of which *Williams v. Carwardine* is the leading example, in which an action has been held to lie for a reward offered by public advertisement for information leading to the discovery of crime, or to the recovery of lost property. In those cases the performance of the conditions upon which the reward becomes payable is wholly within the power of the person possessed of the information. Here the plaintiff could not by her own act entitle herself to the money, for the money would not become payable immediately upon her using the defendants' smoke ball, but only upon the happening of a further event over which she had no control, namely, her contracting the influenza.

Secondly, if there was a contract it was void, as being a contract by way of wagering, within the meaning of 8 & 9 Vict. c. 109. A wagering contract is one the liability to perform which depends on events beyond the control of the parties. This case is similar to *Brogden v. Marriott*, where an agreement by which the defendant sold the plaintiff a horse, on the terms that the price should be 200l. if within one month after the date of the agreement it trotted eighteen miles in an hour, but one shilling if it failed to do so, was held to be a wager, and void as such, under 9 Anne, c. 14. So, too, in *Rourke v. Short*, a contract for the sale and purchase of goods at a price to be regulated by ascertaining a past fact unknown to the parties at the time of the contract was held to be void as a wager. In *Taylor v. Smetten*, where the defendant sold at a fixed price packets containing a pound of tea and a coupon entitling the purchaser to a prize the amount of which was not determined till after the sale, it was held that the transaction was a gaming transaction, and an offence against the Lottery Act.

Thirdly, if there was a contract, and it was not a wagering contract, then it was a contract by way of insurance, and void under s. 2 of 14 Geo. 3, c. 48, which provides that, "It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons, name or names, interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote."

**W. Graham, (Murphy, Q.C. and Bonner, with him)**, for the plaintiff. The transaction between the parties amounted to a contract of warranty of prevention of disease with liquidated damages in the event of breach. The advertisement which was issued by the defendants was an offer by them to enter into such a contract, which offer was accepted and converted into a contract upon any person performing the conditions of the advertisement. This view is in accordance with the judgments of Lord Campbell and Wightman, J., in *Denton v. Great Northern Ry. Co.*, who held that the statement by a railway company in their timetables of the times at which their trains would run, amounted to a contract with any person who came to the station and tendered the price of a ticket that the trains would run at the times stated. In *England v. Davidson*, where the defendant offered a reward to whoever would give such information as would lead to the conviction of a felon, and the plaintiff gave such information, it was held that he was entitled to recover.

Upon the second point, the case of *Thacker v. Hardy* is conclusive in favour of the plaintiff that the contract in this case was not a wager. There Cotton L.J., says (at p. 695): "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature - that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win." Here the plaintiff was to win £100 if she got the influenza, but the defendants were not to win anything if she did not. So in *Caminada v. Hulton*, where the publisher of a book containing information as to horse-races promised to pay a sum of money to any purchaser of the book who correctly prophesied the winning horses in certain future races, it was held that the promise was not a wager, there being no mutuality of gain and loss.

With regard to the contract being a policy of insurance, the cases go to shew that a contract to fall within the Act of Geo. 3 must be shaped in the form of a policy: *Morgan v. Pebrer*, *Cook v. Field*. Here the plaintiff was not merely to pay a premium as in the case of an ordinary policy, but was further to do something, namely, use the smoke ball.

**Loehnis**, in reply. It is stated in Smith's Leading Cases, 9th ed. vol. ii. p. 311, that the Act of Geo. 3 applies to such contracts "as are ordinarily, and in the common course of business, made by way of policy." That exactly covers the case of an insurance against accident such as this.

**Cur. adv. vult.**

**HAWKINS J.**

The facts not being in dispute, I was requested to hear the legal objections discussed on further consideration, and to enter the verdict and judgment as I thought right. I have done so, and I proceed now to deliver my judgment.

Four questions require consideration in determining this case.

1st. Was there a contract of any kind between the parties to this action?

2nd. Was such contract, if any, wholly or partly in writing so as to require a stamp?

3rd. Was the contract a wagering contract?

4th. Was it a contract of insurance affected by statute, 14 Geo. 3, c. 48, s. 2.

As regards the first question, I am of opinion that the offer or proposal in the advertisement, coupled with the performance by the plaintiff of the condition, created a contract on the part of the defendants to pay the £100 upon the happening of the event mentioned in the proposal. It seems to me that the contract may be thus described. In consideration that the plaintiff would use the carbolic smoke ball three times daily for two weeks according to printed directions supplied with the ball, the defendants would pay to her £100 if after having so used the ball she contracted the epidemic known as influenza.

The advertisement inserted in the Pall Mall Gazette in large type was undoubtedly so inserted in the hope that it would be read by all who read that journal, and the announcement that 1000l. had been deposited with the Alliance Bank could only have been inserted with the object of leading those who read it to believe that the defendants were serious in their proposal, and would fulfil their promise in the event mentioned; their own words, "shewing our sincerity in the matter," state as much. It may be that, of the many readers of the advertisement, very few of the sensible ones would have entertained expectations that in the event of the smoke ball failing to act as a preventive against the disease, the defendants had any intention to fulfil their attractive and alluring promise; but it must be remembered that such advertisements do not appeal so much to the wise and thoughtful as to the credulous and weak portions of the community; and if the vendor of an article, whether it be medicine smoke or anything else, with a view to increase its sale or use, thinks fit publicly to promise to all who buy or use it that, to those who shall not find it as surely efficacious as it is represented by him to be he will pay a substantial sum of money, he must not be surprised if occasionally he is held to his promise.

I notice that in the present case the promise is of £100 reward; but the substance of the offer is to pay the named sum as compensation for the failure of the article to produce the guaranteed effect of the two weeks' daily use as directed. Such daily use was sufficient legal consideration to support the promise. In *Williams v. Carwardine* (1833) the defendant, on April 25, 1831, published a handbill, stating that whoever would give such information as should lead to the discovery of the

murder of Walter Carwardine should, on conviction, receive a reward of £20. In August, 1831, the plaintiff gave information which led to the conviction of one Williams. The Court, consisting of Lord Denman, C.J., Littledale, Parke, and Patteson, JJ., held, that the plaintiff was entitled to recover the £20 upon the ground that the advertisement amounted to a general promise or contract to pay the offered reward to any person who performed the condition mentioned in it, namely, who gave the information. If authority was wanted to confirm the view I have taken, it is furnished by the case I have just cited.

This brings one to the second question, whether the advertisement, which is the only written or printed document affecting the contract, requires to be stamped as an agreement before it can be admitted in evidence. This depends upon the language of the Stamp Act, 1891 (54 & 55 Vict. c. 39), which requires "an agreement, or any memorandum of an agreement ... under hand only, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument," to be duly stamped.

Whether a written or printed document falls within this requirement depends upon its character at the time it was committed to writing, or print, and issued. If at the time no concluded contract had been arrived at by the contracting parties, it certainly could not in any sense be treated as an agreement, nor could it be treated as a memorandum of an agreement, for there could be no memorandum of an agreement which had no existence. No document requires an agreement stamp unless it amounts to an agreement, or a memorandum of an agreement. The mere fact that a document may assist in proving a contract does not render it chargeable with stamp duty; it is only so chargeable when the document amounts to an agreement of itself or to a memorandum of an agreement already made. A mere proposal or offer until accepted amounts to nothing. If accepted in writing, the offer and acceptance together amount to an agreement; but, if accepted by parol, such acceptance does not convert the offer into an agreement nor into a memorandum of an agreement, unless, indeed, after the acceptance, something is said or done by the parties to indicate that in the future it is to be so considered: see *Edgar v. Black*; *Chaplin v. Clarke*; *Hudspeth v. Yarnold*; *Clay v. Crofts*. I think for the reasons I have given, supported as they are by authority, the advertisement does not require to be stamped.

The third question is whether the contract I have found to exist is a contract by way of gaming or wagering within the meaning of statute 8 & 9 Vict. c. 109, s. 18, which renders such contracts null and void, and, therefore, not enforceable by action. I think it is not. It is not easy to define with precision what amounts to a wagering contract, nor the narrow line of demarcation which separates a wagering from an ordinary contract; but, according to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.

It is also essential that there should be mutuality in the contract. For instance, if the evidence of the contract is such as to make the intentions of the parties material in the consideration of the question whether it is a wagering one or not, and those intentions are at variance, those of one party being such as if agreed in by the other would make the contract a wagering one, whilst those of the other would prevent it from becoming so, this want of mutuality would destroy the wagering element of the contract and leave it enforceable by law as an ordinary one: see *Grizewood v. Blane*; *Thacker v. Hardy*; *Blaxton v. Pye*. No better illustration can be given of a purely wagering contract than a bet on a horse-race. A. backs Tortoise with B. for £100 to win the Derby. B. lays ten to one against him - that is, 1,000 to 100. How the event will turn out is uncertain until the race is over. Until then, A. may win £1,000 or he may lose £100; B. may win £100 or he may lose £1,000;

but each must be a winner or a loser on the event. Under the wager neither has any interest except in the money he may win or lose by it. True it is that one or both of the parties may have an interest in the property of the horse; but that interest is altogether apart from the bet, and each party is in agreement with the other as to the nature and intention of his engagement. If any one desires to read more upon the subject of wagers he will find the subject fully and clearly treated in Mr. Stutfield's able and learned book. One other matter ought to be mentioned, namely, that in construing a contract with a view to determining whether it is a wagering one or not, the Court will receive evidence in order to arrive at the substance of it, and will not confine its attention to the mere words in which it is expressed, for a wagering contract may be sometimes concealed under the guise of language which, on the face of it, if words were only to be considered, might constitute a legally enforceable contract. Such was the case in *Brogden v. Marriott*, in which under the guise of a contract for the sale by the defendant to the plaintiff of a horse at a price to depend on the event of a trial of its speed and staying power, there was concealed a mere bet of the defendant's horse to £200 that the horse within a month should trot eighteen miles within an hour. The defendant's horse having failed to accomplish the task set him, plaintiff claimed the horse at a nominal price of 1s. The nature of this contract was transparent to any person of ordinary intelligence, and the plaintiff in vain argued that it was a bonâ fide conditional bargain. The Court held it to be nothing more nor less than a mere wagering contract prohibited by the then unrepealed statute 9 Anne, c. 14. In that case the nature of the contract was very clearly to be inferred from the statement of it in the record. Of course, if in any case it is suggested that a contract good on the face of it was a mere device to elude the operation of the statute, the question would be one for a jury to solve: see also *Hill v. Fox*; *Grizewood v. Blane*.

In the present case an essential element of a wagering contract is absent. The event upon which the defendants promised to pay the £100 depended upon the plaintiff's contracting the epidemic influenza after using the ball; but, on the happening of that event, the plaintiff alone could derive benefit. On the other hand, if that event did not happen, the defendants could gain nothing, for there was no promise on the plaintiff's part to pay or do anything if the ball had the desired effect. When the contract first of all came into existence (i.e., when the plaintiff had performed the consideration for the defendants' promise), in no event could the plaintiff lose anything, nor could the defendants win anything. At the trial it was not even suggested that any evidence could be offered to alter the character of the contract or the facts as deposed to by the plaintiff. I am clearly of opinion that, if those facts established a contract, as I think they did, it was not of a wagering character.

As to the objection that this contract (if any) was one of insurance, and invalid for non-compliance with the statute 14 Geo. 3, c. 48, s. 2, which enacts that "it shall not be lawful to make any policy or policies on the life or lives of any person, or other event or events, without inserting in such policy or policies the person or persons, name or names, interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote," it seems to me that the simple answer to that objection is that the section relates only to a policy which is a written document, and cannot apply to a contract like the present, which is created by a written proposal or offer accepted by the fulfilment by the plaintiff of the conditions attached to the offer. I do not feel it necessary to discuss the question whether the contract is one of insurance, which kind of contract Blackburn J., in *Wilson v. Jones*, thus describes: "A policy is, properly speaking, a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to." My present opinion is that it does not amount to such a contract, and certain I am that neither of the parties so intended it.

In the pleadings I find a further defence that the contract was contrary to public policy; but the learned counsel for the defendants was unable to point out to me any grounds for such a contention other than those I have already discussed.

It follows from what I have said that, in my opinion, the plaintiff is entitled to recover the £100. I therefore direct a verdict to be entered for the plaintiff for £100, and judgment accordingly with costs.

## 5. ***Carlill v. The Carbolic Smoke Ball Company* [1893] 1 QB 256: Court of Appeal**

### **In the Court of Appeal**

Lindley, Bowen and A. L. Smith L.JJ.

1892 Dec. 6, 7.

Contract—Offer by Advertisement—Performance of Condition in Advertisement—Notification of Acceptance of Offer—Wager—Insurance— 8 & 9 Vict. c. 109 — 14 Geo. 3, c. 48, s. 2 .

The defendants, the proprietors of a medical preparation called “The Carbolic Smoke Ball,” issued an advertisement in which they offered to pay £100 to any person who contracted the influenza after having used one of their smoke balls in a specified manner and for a specified period. The plaintiff on the faith of the advertisement bought one of the balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:—

Held, affirming the decision of Hawkins, J., that the above facts established a contract by the defendants to pay the plaintiff £100 in the event which had happened; that such contract was neither a contract by way of wagering within 8 & 9 Vict. c. 109 , nor a policy within 14 Geo. 3, c. 48, s. 2 ; and that the plaintiff was entitled to recover.

APPEAL from a decision of Hawkins J.

The defendants, who were the proprietors and vendors of a medical preparation called “The Carbolic Smoke Ball,” inserted in the Pall Mall Gazette of November 13, 1891, and in other newspapers, the following advertisement:

“£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1,000 is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.

“During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

“One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s., post free. The ball can be refilled at a cost of 5s. Address, Carbolic Smoke Ball Company, 27, Princes Street, Hanover Square, London.”

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's, and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the £100. The defendants appealed.

**Finlay, Q.C.**, and **T. Terrell** , for the defendants. The facts shew that there was no binding contract between the parties. The case is not like *Williams v. Carwardine*, where the money was to become payable on the performance of certain acts by the plaintiff; here the plaintiff could not by any act of her own establish a claim, for, to establish her right to the money, it was necessary that she should be attacked by influenza - an event over which she had no control. The words express an intention, but do not amount to a promise: *Week v. Tibold*. The present case is similar to *Harris v. Nickerson*. The advertisement is too vague to be the basis of a contract; there is no limit as to time, and no means of checking the use of the ball. Anyone who had influenza might come forward and depose that he had used the ball for a fortnight, and it would be impossible to disprove it. *Guthing v. Lynn*

supports the view that the terms are too vague to make a contract, there being no limit as to time, a person might claim who took the influenza ten years after using the remedy. There is no consideration moving from the plaintiff: *Gerhard v. Bates*. The present case differs from *Denton v. Great Northern Ry. Co.*, for there an overt act was done by the plaintiff on the faith of a statement by the defendants. In order to make a contract by fulfilment of a condition, there must either be a communication of intention to accept the offer, or there must be the performance of some overt act. The mere doing an act in private will not be enough. This principle was laid down by Lord Blackburn in *Brogden v. Metropolitan Ry. Co.*

The terms of the advertisement would enable a person who stole the balls to claim the reward, though his using them was no possible benefit to the defendants. At all events, the advertisement should be held to apply only to persons who bought directly from the defendants. But, if there be a contract at all, it is a wagering contract, as being one where the liability depends on an event beyond the control of the parties, and which is therefore void under 8 & 9 Vict. c. 109. Or, if not, it is bad under 14 Geo. 3, c. 48, s. 2, as being a policy of insurance on the happening of an uncertain event, and not conforming with the provisions of that section.

**Dickens, Q.C.**, and **W. B. Alle**, for the plaintiff. [THE COURT intimated that they required no argument as to the question whether the contract was a wager or a policy of insurance.] The advertisement clearly was an offer by the defendants; it was published that it might be read and acted on, and they cannot be heard to say that it was an empty boast, which they were under no obligation to fulfil. The offer was duly accepted. An advertisement was addressed to all the public - as soon as a person does the act mentioned, there is a contract with him. It is said that there must be a communication of the acceptance; but the language of Lord Blackburn, in *Brogden v. Metropolitan Ry. Co.*, shews that merely doing the acts indicated is an acceptance of the proposal. It never was intended that a person proposing to use the smoke ball should go to the office and obtain a repetition of the statements in the advertisement. The defendants are endeavouring to introduce words into the advertisement to the effect that the use of the preparation must be with their privacy or under their superintendence. Where an offer is made to all the world, nothing can be imported beyond the fulfilment of the conditions. Notice before the event cannot be required; the advertisement is an offer made to any person who fulfils the condition, as is explained in *Spencer v. Harding*. *Williams v. Carwardine*. shews strongly that notice to the person making the offer is not necessary. The promise is to the person who does an act, not to the person who says he is going to do it and then does it. As to notice after the event, it could have no effect, and the present case is within the language of Lord Blackburn in *Brogden v. Metropolitan Ry. Co.* It is urged that the terms are too vague and uncertain to make a contract; but, as regards parties, there is no more uncertainty than in all other cases of this description. It is said, too, that the promise might apply to a person who stole any one of the balls. But it is clear that only a person who lawfully acquired the preparation could claim the benefit of the advertisement. It is also urged that the terms should be held to apply only to persons who bought directly from the defendants; but that is not the import of the words, and there is no reason for implying such a limitation, an increased sale being a benefit to the defendants, though effected through a middleman, and the use of the balls must be presumed to serve as an advertisement and increase the sale. As to the want of restriction as to time, there are several possible constructions of the terms; they may mean that, after you have used it for a fortnight, you will be safe so long as you go on using it, or that you will be safe during the prevalence of the epidemic. Or the true view may be that a fortnight's use will make a person safe for a reasonable time. Then as to the consideration. In *Gerhard v. Bates*, Lord Campbell never meant to say that if there was a direct invitation to take shares, and shares were taken on the faith of it, there was no consideration. The decision went on the form of the declaration, which did not state that the contract extended to future holders. The decision that there was no consideration was qualified by the words "as between these parties," the plaintiff not having alleged himself to be a member of the class to whom the promise was made.

**Finlay, Q.C.**, in reply. There is no binding contract. The money is payable on a person's taking influenza after having used the ball for a fortnight, and the language would apply just as well to a person who had used it for a fortnight before the advertisement as to a person who used it on the

faith of the advertisement. The advertisement is merely an expression of intention to pay £100 to a person who fulfils two conditions; but it is not a request to do anything, and there is no more consideration in using the ball than in contracting the influenza. That a contract should be completed by a private act is against the language of Lord Blackburn in *Brogden v. Metropolitan Ry. Co.* The use of the ball at home stands on the same level as the writing a letter which is kept in the writer's drawer. In *Denton v. Great Northern Ry. Co.* the fact was ascertained by a public, not a secret act. The respondent relies on *Williams v. Carwardine*, and the other cases of that class; but there a service was done to the advertiser. Here no service to the defendants was requested, for it was no benefit to them that the balls should be used: their interest was only that they should be sold. Those cases also differ from the present in this important particular, that in them the service was one which could only be performed by a limited number of persons, so there was no difficulty in ascertaining with whom the contract was made. It is said the advertisement was not a legal contract, but a promise in honour, which, if the defendants had been approached in a proper way, they would have fulfilled. A request is as necessary in the case of an executed consideration as of an executory one: *Lampleigh v. Braithwait*; and here there was no request.

Then as to the want of limitation as to time, it is conceded that the defendants cannot have meant to contract without some limit, and three limitations have been suggested. The limitation "during the prevalence of the epidemic" is inadmissible, for the advertisement applies to colds as well as influenza. The limitation "during use" is excluded by the language "after having used." The third is, "within a reasonable time," and that is probably what was intended; but it cannot be deduced from the words; so the fair result is that there was no legal contract at all.

#### LINDLEY L.J.

[The Lord Justice stated the facts, and proceeded:—] I will begin by referring to two points which were raised in the Court below. I refer to them simply for the purpose of dismissing them. First, it is said no action will lie upon this contract because it is a policy. You have only to look at the advertisement to dismiss that suggestion. Then it was said that it is a bet. Hawkins, J., came to the conclusion that nobody ever dreamt of a bet, and that the transaction had nothing whatever in common with a bet. I so entirely agree with him that I pass over this contention also as not worth serious attention.

Then, what is left? The first observation I will make is that we are not dealing with any inference of fact. We are dealing with an express promise to pay £100 in certain events. Read the advertisement how you will, and twist it about as you will, here is a distinct promise expressed in language which is perfectly unmistakable —

"£100 reward will be paid by the Carbollic Smoke Ball Company to any person who contracts the iufluenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball."

We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: "£1,000 is deposited with the Alliance Bank, shewing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter - that is, the sincerity of his promise to pay this 100l. in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the



offer. In point of law this advertisement is an offer to pay £100 to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is *Williams v. Carwardine*, which has been followed by many other decisions upon advertisements offering rewards.

But then it is said, "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified." Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required - which I doubt very much, for I rather think the true view is that which was expressed and explained by Lord Blackburn in the case of *Brogden v. Metropolitan Ry. Co.* - if notice of acceptance is required, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shews by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.

We, therefore, find here all the elements which are necessary to form a binding contract enforceable in point of law, subject to two observations. First of all it is said that this advertisement is so vague that you cannot really construe it as a promise - that the vagueness of the language shews that a legal promise was never intended or contemplated.

The language is vague and uncertain in some respects, and particularly in this, that the £100 is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, When are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the rest of your life, and I think it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to shew what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which will answer the purpose of the plaintiff. Possibly it may be limited to persons catching the "increasing epidemic" (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball. Then it is asked, What is a reasonable time? It has been suggested that there is no standard of reasonableness; that it depends upon the reasonable time for a germ to develop! I do not feel pressed by that. It strikes me that a reasonable time may be ascertained in a business sense and in a sense satisfactory to a lawyer, in this way; find out from a chemist what the ingredients are; find out from a skilled physician how long the effect of such ingredients on the system could be reasonably expected to endure so as to protect a person from an epidemic or cold, and in that way you will get a standard to be laid before a jury, or a judge without a jury, by which they might exercise their judgment as to what a reasonable time would be. It strikes me, I confess, that the true construction of this advertisement is that 100l. will be paid to anybody who uses this smoke ball three times daily for two weeks according to the

printed directions, and who gets the influenza or cold or other diseases caused by taking cold within a reasonable time after so using it; and if that is the true construction, it is enough for the plaintiff.

I come now to the last point which I think requires attention - that is, the consideration. It has been argued that this is *nudum pactum* - that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise.

We were pressed upon this point with the case of *Gerhard v. Bates*, which was the case of a promoter of companies who had promised the bearers of share warrants that they should have dividends for so many years, and the promise as alleged was held not to shew any consideration. Lord Campbell's judgment when you come to examine it is open to the explanation, that the real point in that case was that the promise, if any, was to the original bearer and not to the plaintiff, and that as the plaintiff was not suing in the name of the original bearer there was no contract with him. Then Lord Campbell goes on to enforce that view by shewing that there was no consideration shewn for the promise to him.

I cannot help thinking that Lord Campbell's observations would have been very different if the plaintiff in that action had been an original bearer, or if the declaration had gone on to shew what a *société anonyme* was, and had alleged the promise to have been, not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the Court said, in the absence of such allegation, they did not know (judicially, of course) what a *société anonyme* was, and, therefore, there was no consideration. But in the present case, for the reasons I have given, I cannot see the slightest difficulty in coming to the conclusion that there is consideration.

It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.

#### **BOWEN L.J.**

I am of the same opinion. We were asked to say that this document was a contract too vague to be enforced.

The first observation which arises is that the document itself is not a contract at all, it is only an offer made to the public. The defendants contend next, that it is an offer the terms of which are too vague to be treated as a definite offer, inasmuch as there is no limit of time fixed for the catching of the influenza, and it cannot be supposed that the advertisers seriously meant to promise to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball. It was urged also, that if you look at this document you will find much vagueness as to the persons with whom the contract was intended to be made - that, in the first place, its terms are wide enough to include persons who may have used the smoke ball before the advertisement was issued; at all

events, that it is an offer to the world in general, and, also, that it is unreasonable to suppose it to be a definite offer, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense. It is also contended that the advertisement is rather in the nature of a puff or a proclamation than a promise or offer intended to mature into a contract when accepted. But the main point seems to be that the vagueness of the document shews that no contract whatever was intended. It seems to me that in order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it? It was intended unquestionably to have some effect, and I think the effect which it was intended to have, was to make people use the smoke ball, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly, or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the use of it should be increased. The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic after using the ball. It has been said that the words do not apply only to persons who contract the epidemic after the publication of the advertisement, but include persons who had previously contracted the influenza. I cannot so read the advertisement. It is written in colloquial and popular language, and I think that it is equivalent to this: "£100 will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks." And it seems to me that the way in which the public would read it would be this, that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward. Then again it was said: "How long is this protection to endure? Is it to go on for ever, or for what limit of time?" I think that there are two constructions of this document, each of which is good sense, and each of which seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic, and it was during the epidemic that the plaintiff contracted the disease. I think, more probably, it means that the smoke ball will be a protection while it is in use. That seems to me the way in which an ordinary person would understand an advertisement about medicine, and about a specific against influenza. It could not be supposed that after you have left off using it you are still to be protected for ever, as if there was to be a stamp set upon your forehead that you were never to catch influenza because you had once used the carbolic smoke ball. I think the immunity is to last during the use of the ball. That is the way in which I should naturally read it, and it seems to me that the subsequent language of the advertisement supports that construction. It says: "During the last epidemic of influenza many thousand carbolic smoke balls were sold, and in no ascertained case was the disease contracted by those using" (not "who had used") "the carbolic smoke ball," and it concludes with saying that one smoke ball will last a family several months (which imports that it is to be efficacious while it is being used), and that the ball can be refilled at a cost of 5s. I, therefore, have myself no hesitation in saying that I think, on the construction of this advertisement, the protection was to enure during the time that the carbolic smoke ball was being used. My brother, the Lord Justice who preceded me, thinks that the contract would be sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point; but it is not necessary for me to consider it further, because the disease here was contracted during the use of the carbolic smoke ball.

Was it intended that the £100 should, if the conditions were fulfilled, be paid? The advertisement says that £1,000 is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that £100 would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

But it was said there was no check on the part of the persons who issued the advertisement, and that it would be an insensate thing to promise £100 to a person who used the smoke ball unless you could check or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so

because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.

It was also said that the contract is made with all the world - that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate - offers to receive offers - offers to chaffer, as, I think, some learned judge in one of the cases has said. If this is an offer to be bound, then it is a contract the moment the person fulfils the condition. That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century; and it cannot be put better than in Willes, J.'s, judgment in *Spencer v. Harding*. "In the advertisement cases," he says, "there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract, of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons." As soon as the highest bidder presented himself, says Willes, J., the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled.

Then it was said that there was no notification of the acceptance of the contract. One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law - I say nothing about the laws of other countries - to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

That seems to me to be the principle which lies at the bottom of the acceptance cases, of which two instances are the well-known judgment of Mellish, L.J., in *Harris's Case*, and the very instructive judgment of Lord Blackburn in *Brogden v. Metropolitan Ry. Co.*, in which he appears to me to take exactly the line I have indicated.

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons

whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

A further argument for the defendants was that this was a *nudum pactum* - that there was no consideration for the promise - that taking the influenza was only a condition, and that the using the smoke ball was only a condition, and that there was no consideration at all; in fact, that there was no request, express or implied, to use the smoke ball. Now, I will not enter into an elaborate discussion upon the law as to requests in this kind of contracts. I will simply refer to *Victors v. Davies* and Serjeant Manning's note to *Fisher v. Pyne*, which everybody ought to read who wishes to embark in this controversy. The short answer, to abstain from academical discussion, is, it seems to me, that there is here a request to use involved in the offer. Then as to the alleged want of consideration. The definition of "consideration" given in Selwyn's *Nisi Prius*, 8th ed. p. 47, which is cited and adopted by Tindal, C.J., in the case of *Laythoarp v. Bryant*, is this: "Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant." Can it be said here that if the person who reads this advertisement applies thrice daily, for such time as may seem to him tolerable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all - that it is a mere act which is not to count towards consideration to support a promise (for the law does not require us to measure the adequacy of the consideration). Inconvenience sustained by one party at the request of the other is enough to create a consideration. I think, therefore, that it is consideration enough that the plaintiff took the trouble of using the smoke ball. But I think also that the defendants received a benefit from this user, for the use of the smoke ball was contemplated by the defendants as being indirectly a benefit to them, because the use of the smoke balls would promote their sale.

Then we were pressed with *Gerhard v. Bates*. In *Gerhard v. Bates*, which arose upon demurrer, the point upon which the action failed was that the plaintiff did not allege that the promise was made to the class of which alone the plaintiff was a member, and that therefore there was no privity between the plaintiffs and the defendant. Then Lord Campbell went on to give a second reason. If his first reason was not enough, and the plaintiff and the defendant there had come together as contracting parties and the only question was consideration, it seems to me Lord Campbell's reasoning would not have been sound. It is only to be supported by reading it as an additional reason for thinking that they had not come into the relation of contracting parties; but, if so, the language was superfluous. The truth is, that if in that case you had found a contract between the parties there would have been no difficulty about consideration; but you could not find such a contract. Here, in the same way, if you once make up your mind that there was a promise made to this lady who is the plaintiff, as one of the public - a promise made to her that if she used the smoke ball three times daily for a fortnight and got the influenza, she should have 100l., it seems to me that her using the smoke ball was sufficient consideration.

I cannot picture to myself the view of the law on which the contrary could be held when you have once found who are the contracting parties. If I say to a person, "If you use such and such a medicine for a week I will give you £5," and he uses it, there is ample consideration for the promise.

The first point in this case is, whether the defendants' advertisement which appeared in the Pall Mall Gazette was an offer which, when accepted and its conditions performed, constituted a promise to pay, assuming there was good consideration to uphold that promise, or whether it was only a puff from which no promise could be implied, or, as put by Mr. Finlay, a mere statement by the defendants of the confidence they entertained in the efficacy of their remedy. Or as I might put it in the words of Lord Campbell in *Denton v. Great Northern Ry. Co.*, whether this advertisement was mere waste paper. That is the first matter to be determined. It seems to me that this advertisement reads as follows: "£100 reward will be paid by the Carbollic Smoke Ball Company to any person who after having used the ball three times daily for two weeks according to the printed directions supplied with such ball contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold. The ball will last a family several months, and can be refilled at a cost of 5s." If I may paraphrase it, it means this: "If you" - that is one of the public as yet not ascertained, but who, as Lindley and Bowen, L.JJ., have pointed out, will be ascertained by the performing the condition — "will hereafter use my smoke ball three times daily for two weeks according to my printed directions, I will pay you £100 if you contract the influenza within the period mentioned in the advertisement." Now, is there not a request there? It comes to this: "In consideration of your buying my smoke ball, and then using it as I prescribe, I promise that if you catch the influenza within a certain time I will pay you £100." It must not be forgotten that this advertisement states that as security for what is being offered, and as proof of the sincerity of the offer, £1,000 is actually lodged at the bank wherewith to satisfy any possible demands which might be made in the event of the conditions contained therein being fulfilled and a person catching the epidemic so as to entitle him to the £100. How can it be said that such a statement as that embodied only a mere expression of confidence in the wares which the defendants had to sell? I cannot read the advertisement in any such way. In my judgment, the advertisement was an offer intended to be acted upon, and when accepted and the conditions performed constituted a binding promise on which an action would lie, assuming there was consideration for that promise. The defendants have contended that it was a promise in honour or an agreement or a contract in honour - whatever that may mean. I understand that if there is no consideration for a promise, it may be a promise in honour, or, as we should call it, a promise without consideration and *nudum pactum*; but if anything else is meant, I do not understand it. I do not understand what a bargain or a promise or an agreement in honour is unless it is one on which an action cannot be brought because it is *nudum pactum*, and about *nudum pactum* I will say a word in a moment.

In my judgment, therefore, this first point fails, and this was an offer intended to be acted upon, and, when acted upon and the conditions performed, constituted a promise to pay.

In the next place, it was said that the promise was too wide, because there is no limit of time within which the person has to catch the epidemic. There are three possible limits of time to this contract. The first is, catching the epidemic during its continuance; the second is, catching the influenza during the time you are using the ball; the third is, catching the influenza within a reasonable time after the expiration of the two weeks during which you have used the ball three times daily. It is not necessary to say which is the correct construction of this contract, for no question arises thereon. Whichever is the true construction, there is sufficient limit of time so as not to make the contract too vague on that account.

Then it was argued, that if the advertisement constituted an offer which might culminate in a contract if it was accepted, and its conditions performed, yet it was not accepted by the plaintiff in the manner contemplated, and that the offer contemplated was such that notice of the acceptance had to be given by the party using the carbollic ball to the defendants before user, so that the defendants might be at liberty to superintend the experiment. All I can say is, that there is no such clause in the advertisement, and that, in my judgment, no such clause can be read into it; and I entirely agree with what has fallen from my Brothers, that this is one of those cases in which a performance of the condition by using these smoke balls for two weeks three times a day is an acceptance of the offer.

It was then said there was no person named in the advertisement with whom any contract was made. That, I suppose, has taken place in every case in which actions on advertisements have been maintained, from the time of *Williams v. Carwardine*, and before that, down to the present day. I have nothing to add to what has been said on that subject, except that a person becomes a *persona designata* and able to sue, when he performs the conditions mentioned in the advertisement.

Lastly, it was said that there was no consideration, and that it was *nudum pactum*. There are two considerations here. One is the consideration of the inconvenience of having to use this carbolic smoke ball for two weeks three times a day; and the other more important consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls, by reason of the plaintiff's user of them. There is ample consideration to support this promise. I have only to add that as regards the policy and the wagering points, in my judgment, there is nothing in either of them.

## **Representation**

Solicitors: J. Banks Pittman; Field & Roscoe .

Appeal dismissed. (H. C. J.)

## 6. ***Fisher v. Bell* [1960] 3 WLR 919: Divisional Court of the QBD**

Divisional Court: Lord Parker C.J., Ashworth and Elwes JJ. 1960 Nov. 10.

Crime--Offensive weapon--"Offers for sale"--"Flick knife" displayed in shop window with ticket bearing description and price--Whether an offence committed--Restriction of Offensive Weapons Act, 1959 (7 & 8 Eliz. 2, c. 37), s. 1 (1) .

Statute--Construction--Omission--Interpretation of words used--No power in court to fill in gaps.

A shopkeeper displayed in his shop window a knife of the type commonly known as a "flick knife" with a ticket behind it bearing the words "Ejector knife - 4s." An information was preferred against him by the police alleging that he had offered the knife for sale contrary to section 1 (1) of the Restriction of Offensive Weapons Act, 1959, [FN1] but the justices concluded that no offence had been committed under the section and dismissed the information. On appeal by the prosecutor:-

**Restriction of Offensive Weapons Act, 1959, s. 1 (1):** "Any person who manufactures, sells or hires or offers for sale or hire, or lends or gives to any other person - (a) any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, sometimes known as a 'flick knife' or 'flick gun'; ... shall be guilty of an offence and shall be liable on summary conviction in the case of a first offence to imprisonment for a term not exceeding three months or to a fine not exceeding fifty pounds or to both such imprisonment and fine"

Held, that in the absence of any definition in the Act extending the meaning of "offer for sale," that term must be given the meaning attributed to it in the ordinary law of contract, and as thereunder the display of goods in a shop window with a price ticket attached was merely an invitation to treat and not an offer \*395 for sale the acceptance of which constituted a contract, the justices had correctly concluded that no offence had been committed.

*Keating v. Horwood* (1926) 28 Cox C.C. 198, D.C. and *Wiles v. Maddison* [1943] W.N. 40; [1943] 1 All E.R. 315, D.C. distinguished.

*Per* Lord Parker C.J. At first sight it seems absurd that knives of this sort cannot be manufactured, sold, hired, lent or given, but can apparently be displayed in shop windows; but even if this is a casus omissus it is not for the court to supply the omission.

CASE STATED by Bristol justices.

On December 14, 1959, an information was preferred by Chief Inspector George Fisher, of the Bristol Constabulary, against James Charles Bell, the defendant, alleging that the defendant, on October 26, 1959, at his premises in The Arcade, Broadmead, Bristol, unlawfully did offer for sale a knife which had a blade which opened automatically by hand pressure applied to a device attached to the handle of the knife (commonly referred to as a "flick knife") contrary to section 1 of the Restriction of Offensive Weapons Act, 1959.

The justices heard the information on February 3, 1960, and found the following facts: The defendant was the occupier of a shop and premises situate at 15-16, The Arcade, Broadmead, at which premises he carried on business as a retail shopkeeper trading under the name of Bell's Music Shop. At 3.15 p.m. on October 26, 1959, Police Constable John Kingston saw displayed in the window of the shop amongst other articles a knife, behind which was a ticket upon which the words "Ejector knife - 4s." were printed. The words referred to the knife in question. The police constable entered the shop, saw the defendant, and said he had reason to believe it was a flick knife displayed in the shop window. He asked if he might examine the knife. The defendant removed the knife from the window and said he had had other policemen in there about the knives.



The constable examined the knife and pursuant to the invitation of the defendant took it away from the premises for examination by a superintendent of police. Later the same day he returned to the defendant's premises and informed him that in his opinion the knife was a flick knife. The defendant said "Why do manufacturers still bring them round for us to sell?" The constable informed the defendant that he would be reported for offering for sale a flick knife and the defendant replied "Fair enough."

It was contended by the prosecutor that the defendant by his actions in displaying the knife in the window with the ticket behind it and referring to it, such actions being carried out with the object of attracting the attention of a buyer of such knife and selling the same to such buyer, had on the day in question offered the knife for sale within the meaning of the Restriction of Offensive Weapons Act, 1959.

It was contended by the defendant that on the facts he at no time offered the knife for sale within the meaning of the Act.

The justices were of opinion that in the absence of a definition in the Act of 1959, the words "offer for sale" ought to be construed as they were in the law of contract, so that, in this instance, the defendant's action was but an invitation to treat, and not a firm offer which needed but a customer's acceptance to make a binding contract of sale. They accordingly dismissed the information. The prosecutor appealed.

*J. A. Cox* for the prosecutor. The sole question is whether this knife exhibited in the shop window with the price ticket behind it was an offer for sale within the meaning of section 1 (1) of the Restriction of Offensive Weapons Act, 1959. Having regard to the context in which the words are found and the mischief at which the Act is aimed, the words "offer for sale" should be construed to cover circumstances such as the present, although it is conceded that in the ordinary law of contract the exhibition of goods in a shop window amounts to no more than an invitation to treat. Support for that submission is to be found in *Keating v. Horwood*, where, in a prosecution under the Sale of Food Order, 1921, which prohibited the offering or exposing for sale of under-weight bread, Lord Hewart C.J. held that a quantity of bread placed in a baker's motor-car and taken on a delivery round was both offered and exposed for sale. See also *Wiles v. Maddison*, where there was a prosecution under the Meat (Maximum Retail Prices) Order, 1940. Reliance is placed on the words of Viscount Caldecote C.J. to the effect that a person who put goods in his shop window to be sold at an excessive price could be convicted of making an offer at too high a price. That case also shows that for the purpose of provisions of this kind an offer can exist without its actually being communicated to the offeree. This knife in the shop window was offered for sale. It may have been a conditional offer, but if a person entered the shop and asked why it was in the window the answer must have been: It is for sale.

[LORD PARKER C.J. In *Keating v. Horwood* two members of the court are in your favour, but this point was not argued.]

The original authority for the proposition that under the law of contract putting something in a shop window is merely an invitation to treat is the old case of *Timothy v. Simpson*, which is cited in *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.* The latter case is not of assistance as it turned on the provisions of an Act which was concerned solely with completed sales as opposed to offers for sale. *Phillips v. Dalziel*, which was concerned with emergency legislation relating to the sale of footwear, turned on a statutory definition, but the facts there were similar to those in *Wiles v. Maddison*. In both cases there was an intention to sell goods later. Had the court not had to consider a statutory definition in *Phillips v. Dalziel*, it would not have been surprising if it had decided that the transaction in that case had reached the stage reached in *Wiles v. Maddison*. Once the legislature embarks on a definition the *expression unius* rule applies. Where there is no definition *Wiles v. Maddison* is authority for the proposition that in legislation which is aimed at a particular mischief it is permissible to construe words more widely than they can be construed in the general law of contract. The Act of 1959 is clearly intended to effect a

complete ban on flick knives, and therefore the words "offer for sale" in section 1 (1) should be given a meaning wide enough to prevent such goods being placed in shop windows with price tickets behind them.

*P. Chadd* for the defendant. The Act upon its face prohibits the manufacture, disposition and marketing of flick knives, but it is not aimed against possession. Mere possession of such a knife, even if it is in a shop window, is not an offence within the Act. The expression "offer for sale" is not defined by the Act and therefore it can only be interpreted by reference to the general law. Displaying goods in a shop window does not amount to an offer for sale; it is merely an invitation to treat: *Timothy v. Simpson*.

Where Parliament wishes to extend the ordinary meaning of "offer for sale" it usually adopts a standard form: see Prices of Goods Act, 1939, s. 20, and Goods and Services (Price Control) Act, 1941, s. 20 (4). It would have been simple for the draftsman to have included a definition of "offer for sale" in the Act of 1959, but he has not done so. The words of section 1 are clear. "Exposed for sale" is not an offence under the section.

This is not an omission or a mistake on the part of Parliament, and, even if it were, it would not be for this court to read words into the Act to perfect it: *Bristol Guardians v. Bristol Waterworks Co.*

Yes; it is not necessary to read words into the Act in order to make it effective. In a civil case no one would contend that it was. Still less should such a course be adopted in a criminal case. In a penal statute the court should not do violence to the words of a statute in order to bring people within it.

As to *Keating v. Horwood*, there was there an obvious exposure for sale, so that it was unnecessary for the court to decide whether there was an offer for sale or not. No authorities on this point were cited in that case, nor was this point argued in *Wiles v. Maddison*, the whole basis of which was that the prosecution only proved an intention to commit an offence the following day. It would be wrong to attach importance to the incidental words of Viscount Caldecote C.J. on which the appellant relies.

Cox in reply. The Act of 1959 may not be aimed at possession, but it is aimed at preventing people from getting possession of flick knives. Its object is to prevent trafficking in such articles. The meaning of the words "offer for sale" in this particular statute must be drawn from the four corners of the statute itself, and if, interpreting the statute as a whole, and bearing in mind its object, the words are seen to be given a wider meaning than they would bear in the law of contract, that is the meaning that should be given to them.

The definitions in the Prices of Goods Act, 1939, and the Goods and Services (Price Control) Act, 1941, cover matters so widely different, e.g., publishing a price list, making a quotation, that, were it not for the definitions, they could not amount in law to an offer for sale and so would have fallen outside the statutes, but that is no reason for saying that where there is no definition section the words must necessarily be construed as in the law of contract. It is not suggested that words should be read into the Act. The intention of the Act is clear and the court should give the words the meaning they ought to bear having regard to the object of the Act.

#### **LORD PARKER C.J.**

The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale within the statute. I confess that I think most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense. In ordinary language it is there inviting people to buy it, and it is for sale; but any statute must of course be looked at in the light of the general law of the country. Parliament in its wisdom in passing an Act must be taken to know the general law. It is perfectly clear that according to the

ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract. That is clearly the general law of the country. Not only is that so, but it is to be observed that in many statutes and orders which prohibit selling and offering for sale of goods it is very common when it is so desired to insert the words "offering or exposing for sale," "exposing for sale" being clearly words which would cover the display of goods in a shop window. Not only that, but it appears that under several statutes - we have been referred in particular to the Prices of Goods Act, 1939, and the Goods and Services (Price Control) Act, 1941 - Parliament, when it desires to enlarge the ordinary meaning of those words, includes a definition section enlarging the ordinary meaning of "offer for sale" to cover other matters including, be it observed, exposure of goods for sale with the price attached.

In those circumstances I am driven to the conclusion, though I confess reluctantly, that no offence was here committed. At first sight it sounds absurd that knives of this sort cannot be manufactured, sold, hired, lent, or given, but apparently they can be displayed in shop windows; but even if this - and I am by no means saying it is - is a *casus omissus* it is not for this court to supply the omission. I am mindful of the strong words of Lord Simonds in *Magor and St. Mellons Rural District Council v. Newport Corporation*. In that case one of the Lords Justices in the Court of Appeal had, in effect, said that the court having discovered the supposed intention of Parliament must proceed to fill in the gaps - what the Legislature has not written the court must write - and in answer to that contention Lord Simonds in his speech said: "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation."

Approaching this matter apart from authority, I find it quite impossible to say that an exhibition of goods in a shop window is itself an offer for sale. We were, however, referred to several cases, one of which is *Keating v. Horwood*, a decision of this court. There, a baker's van was being driven on its rounds. There was bread in it that had been ordered and bread in it that was for sale, and it was found that that bread was under weight contrary to the Sale of Food Order, 1921. That order was an order of the sort to which I have referred already which prohibited the offering or exposing for sale.

In giving his judgment, Lord Hewart C.J. said this: "The question is whether on the facts there were, (1) an offering, and (2) an exposure, for sale. In my opinion, there were both." Avory J. said: "I agree and have nothing to add." Shearman J., however, said: "I am of the same opinion. I am quite clear that this bread was exposed for sale, but have had some doubt whether it can be said to have been offered for sale until a particular loaf was tendered to a particular customer." There are three matters to observe on that case. The first is that the order plainly contained the words "expose for sale," and on any view there was an exposing for sale. Therefore the question whether there was an offer for sale was unnecessary for decision. Secondly, the principles of general contract law were never referred to, and thirdly, albeit all part of the second ground. The respondent was not represented and there was in fact no argument. I cannot take that as an authority for the proposition that the display here in a shop window was an offer for sale.

The other case to which I should refer is *Wiles v. Maddison*. I find it unnecessary to go through the facts of that case, which was a very different case and where all that was proved was an intention to commit an offence the next day, but in the course of his judgment Viscount Caldecote C.J. said: "A person might, for instance, be convicted of making an offer of an article of food at too high a price by putting it in his shop window to be sold at an excessive price, although there would be no evidence of anybody having passed the shop window or having seen the offer or the exposure of the article for sale at that price." Again, be it observed, that was a case where under the Meat (Maximum Retail Prices) Order, 1940, the words were "No person shall sell or offer or expose for sale or buy or offer to buy." Although the Lord Chief Justice does refer to the making of an offer by putting it in the shop window, before the sentence is closed he has in fact turned the phrase to one of exposing the article. I cannot get any assistance in favour of the prosecutor from that passage. Accordingly, I have come to the conclusion in this case that the justices were right, and this appeal must be dismissed.

## 7. ***Hammond v. Mitchell* [1991] 1 WLR 1127**

Family Division: Waite J.

16 April 1991

Trust for Sale—Family home—Beneficial interests—Unmarried couple—Man purchasing property in own name—Woman supporting him in his business interests, looking after home and caring for their children—Dispute as to ownership of assets—Conduct of proceedings—Ascertainment of beneficial interests of parties

The parties, H. and M., began living together in 1977 and, while they were both working, H. encouraged M. to become a part-time business woman. After the birth of the first of their two children in 1979, the couple lived in a bungalow in Essex, which was bought by H. with the aid of a building society mortgage and conveyed into his sole name. Extensions were made to the bungalow and surrounding land purchased by replacing the building society mortgage with a bank loan, and M. agreed that any interest she had in the bungalow as occupier was postponed to the claim of the bank. M. supported H. in his business adventures and he encouraged her part-time trading. H. entered successfully into a number of speculative business ventures, using the bungalow as security, including a business in Spain. He purchased a house there and for a short time they lived together in Spain but they never gave up possession of the Essex bungalow. In 1988 their relationship broke down and the final separation was in February 1989. H. brought two actions in the Queen's Bench Division for the return of property taken by M. Those actions were consolidated and transferred to the Family Division to be heard with M.'s summons, under section 30 of the Law of Property Act 1925, claiming a beneficial interest in the parties' assets.

On the question whether M. had a beneficial interest in the Essex and Spanish properties: —

**Held**, that the financial entitlements of the parties had to be worked out according to their strict equitable rights, which necessitated an enquiry whether there had been any agreement or understanding reached between them based on express discussion and confirmed by action in reliance thereon, or, in the absence of such agreement, whether an intention to share beneficial ownership could be imputed to them; that there was evidence that in relation to the bungalow there was an express understanding that M. should have a beneficial interest in it and in the extensions to it, on which she had relied to her potential detriment in allowing her rights as occupier to be subordinated to those of the bank as mortgagee and through her support of H. in his speculative business ventures, and that taking account of all the circumstances, including M.'s contribution as unpaid business assistant and mother, the proper proportion for her equitable interest was one half; but that, in the absence of agreement, the evidence did not justify imputing to the parties any intention that M. should have a beneficial interest in the Spanish house.

*Grant v. Edwards* [1986] Ch. 638, C.A. and *Lloyds Bank Plc. v. Rosset* [1991] 1 A.C. 107, H.L.(E.) applied .

Observations on the conduct of proceedings brought by unmarried couples disputing their property rights and ownership of chattels (post, pp. 1138E — 1139H).

**The following cases are referred to in the judgment:**

- *Eves v. Eves* [1975] 1 W.L.R. 1338; [1975] 3 All E.R. 768, C.A.
- *Gissing v. Gissing* [1971] A.C. 886; [1970] 3 W.L.R. 255; [1970] 2 All E.R. 780, H.L.(E.)
- *Grant v. Edwards* [1986] Ch. 638; [1986] 3 W.L.R. 114; [1986] 2 All E.R. 426, C.A.
- *Lloyds Bank Plc. v. Rosset* [1991] 1 A.C. 107; [1990] 2 W.L.R. 867; [1990] 1 All E.R. 1111, H.L.(E.)
- *Muetzel v. Muetzel* [1970] 1 W.L.R. 188; [1970] 1 All E.R. 443, C.A.

- *Nixon v. Nixon* [1969] 1 W.L.R. 1676; [1969] 3 All E.R. 1133, C.A.
- *Pettitt v. Pettitt* [1970] A.C. 777; [1969] 2 W.L.R. 966; [1969] 2 All E.R. 385, H.L.(E.)
- *Pettkus v. Becker* (1980) 117 D.L.R. (3d) 257
- *Windeler v. Whitehall* [1990] F.C.R. 268

**The following additional cases, supplied by courtesy of counsel, were cited in argument:**

- *Burns v. Burns* [1984] Ch. 317; [1984] 2 W.L.R. 582; [1984] 1 All E.R. 244, C.A.
- *Cummins, decd., In re* [1972] Ch. 62; [1971] 3 W.L.R. 580; [1971] 3 All E.R. 782, C.A.
- *Layton v. Martin* [1986] 2 F.L.R. 227
- *Lilford (Lord) v. Glynn* [1979] 1 W.L.R. 78; [1979] 1 All E.R. 441, C.A.
- *Midland Bank plc. v. Dobson* [1986] 1 F.L.R. 171, C.A.
- *Sekhon v. Alissa* [1989] 2 F.L.R. 94
- *Thomas v. Fuller-Brown* [1988] 1 F.L.R. 237, C.A.

## Consolidated Actions and Summons

The parties, Tom Hammond and Vicky Mitchell, lived together from 1977 until they separated in 1988, when Miss Mitchell left the bungalow in which they were living taking with her a Mercedes car and other items. On 22 June, Mr. Hammond issued a writ in the Queen's Bench Division claiming the return of the car and other property valued at £50,000. Also in June, he made their two sons wards of court and Miss Mitchell issued a summons in the Family Division claiming a beneficial interest in the bungalow under section 30 of the Law of Property Act 1925 .

The parties returned to live together from the autumn of 1988 until February 1989, when Miss Mitchell again left the bungalow taking a car and other property with her. Mr. Hammond issued a second writ in the Queen's Bench Division claiming the return of the property and also the sum of £16,500 lent to Miss Mitchell to enable her to purchase an interest in a Spanish restaurant. The two actions were consolidated and transferred to the Family Division. Miss Mitchell also sought, under section 12 of the Family Law Reform Act 1987, a secured or capital sum for the maintenance of the two children.

The proceedings were heard and judgment was delivered in chambers. The judgment is reported by leave of Waite J.

The facts are stated in the judgment.

## Representation

- Francis Phillimore for Mr. Hammond.
- Jane Gill for Miss Mitchell.

## Cur. adv. vult.

## Waite J.

In the summer of 1977 Mr. Tom Hammond, a married man of 40 separated from his wife, was setting off for a ride in Epping Forest when he had a chance encounter with Miss Vicky Mitchell, a 21-year-old girl who had stopped her car to ask the way. Their conversation led to further meetings and within a very short time they were living together. He was a trader, dealing in those days principally in second-hand cars. She was a Bunny Girl employed at a high salary by the Playboy Club in Mayfair as one of their croupiers. They both shared a zest for what each described in evidence as "the good life," a concept which for them meant luxury cars rapidly changed, comfortable holidays spent abroad, dining out in restaurants, gaming in casinos and raising and racing greyhounds. They also shared a love of the market-place in the sense of an attachment to

dealing for dealing's sake and a mutual delight in bargain hunting. They were, and still are, both highly charged people emotionally, a quality which accounts both for the strength of the relationship which endured for 11 years and produced two children, and also for the intensity of feeling which marked its end. The net value of the assets they were enjoying together at the time of parting and now in dispute between them approaches £450,000. Mr. Hammond says that virtually all of it is his; Miss Mitchell claims that a substantial part at least of it is hers.

Had they been married, the issue of ownership would scarcely have been relevant, because the law these days when dealing with the financial consequences of divorce adopts a forward-looking perspective in which questions of ownership yield to the higher demands of relating the means of both to the needs of each, the first consideration given to the welfare of children. Since this couple did not marry, none of that flexibility is available to them, except a limited power to direct capital provision for their children. In general, their financial rights have to be worked out according to their strict entitlements in equity, a process which is anything but forward-looking and involves, on the contrary, a painfully detailed retrospect.

The template for that analysis has recently been restated by the House of Lords and the Court of Appeal in *Lloyds Bank Plc. v. Rosset* [1991] 1 A.C. 107 and *Grant v. Edwards* [1986] Ch. 638. The court first has to ask itself whether there have at any time prior to acquisition of the disputed property, or exceptionally at some later date, been discussions between the parties leading to any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Any further investigation carried out by the court will vary in depth according to whether the answer to that initial inquiry is "Yes" or "No." If there have been discussions of that kind and the answer is therefore "Yes," the court then proceeds to examine the subsequent course of dealing between the parties for evidence of conduct detrimental to the party without legal title referable to a reliance upon the arrangement in question. If there have been no such discussions and the answer to that initial inquiry is therefore "No," the investigation of subsequent events has to take the form of an inferential analysis involving a scrutiny of all events potentially capable of throwing evidential light on the question whether, in the absence of express discussion, a presumed intention can be spelt out of the parties' past course of dealing. This operation was vividly described by Dixon J. in Canada as, "The judicial quest for the fugitive or phantom common intention" (*Pettikus v. Becker* (1980) 117 D.L.R. (3d) 257 ), and by Nourse L.J., in *Grant v. Edwards* [1986] Ch. 638, 646, as a "climb up the familiar ground which slopes down from the twin peaks of *Pettitt v. Pettitt* [1970] A.C. 777 and *Gissing v. Gissing* [1971] A.C. 886." The process is detailed, time-consuming and laborious.

The difficulties of applying that formula can be alarming, as this present case has well illustrated. The hearing has occupied no less than 19 days of High Court time and has cost the parties, one of whom is legally aided, more than £125,000 between them in legal fees. Given the mounting pressure on the courts as cases of this kind increase with the growing numbers of the population who choose to live together outside marriage, procedures will clearly have to be worked out to keep such hearings within sensible bounds for the future. This case has been instructive in that respect and at the end of this judgment I shall mention some of the lessons that might be learned from it.

In turning, as I now do, to review the evidence to which the formula has to be applied in the present case, I do not propose to recite everything that was alleged by each party. Neither side had the monopoly of truth. Both were prone to exaggeration. It will be sufficient to say that the findings which now follow represent part-acceptance and part-rejection of the evidence of each party, as well as inferences drawn from their words and actions and the very considerable documentary evidence produced on each side.

The home in which the parties first lived together from the autumn of 1977 was Mr. Hammond's flat, a long leasehold, in which Miss Mitchell does not claim to have had any equitable interest. They both went on working and were able to afford to be generous to each other, each keeping money back for their own purposes and each contributing to the expenses of their shared life. Mr.

Hammond, a man always ready to turn his hand to any deal that promised a profit, was already at this time trading to a small extent in goods other than cars, and he encouraged Miss Mitchell in her wish to become a part-time businesswoman on her own account on a small scale. She started buying onyx telephones from a wholesale dealer friend of his and selling them to and through her colleagues at the Playboy Club. She later enlarged that activity by selling jackets and dresses to work colleagues and friends. Mr. Hammond paid all the outgoings on the flat. Sometimes he paid for the shopping, sometimes she did; and from time to time he paid her sums of money for housekeeping if she was short. They were too much in love at this time either to count the pennies or pay much attention to who was providing them. Mr. Hammond told her, although not immediately, that he was still a married man. One day when they were in bed he said, "This is the beginning. As soon as I am divorced we will get married."

In the summer of 1978 Miss Mitchell discovered that she was pregnant. Mr. Hammond was delighted. There could be no question of her continuing in her present employment for more than a very little longer, and Mr. Hammond enthusiastically persuaded her to give up work altogether. She did so in the autumn of that year. She kept her hand in, however, as a part-time businesswoman by continuing to sell goods on her own account on a small scale from home through an informal sales network of friends. Being at home also left her free to help Mr. Hammond in his business activities, which by now were involving goods on an increasing scale in addition to cars. Their elder son was born on 7 March 1979 by caesarean section. Mr. Hammond was with Miss Mitchell until the moment of the operation and in the course of a visit to her immediately after the birth he gave her a ring and said, "We are engaged, this is our engagement." They talked about their new home, for by then they were already planning to move, and on this occasion, also, Mr. Hammond assured Miss Mitchell that they would marry as soon as his divorce came through.

The house on which they had already had their eye at the time of the son's birth became available for purchase soon afterwards. It was a bungalow in the semi-rural area of Essex adjoining the junction of the M11 and M25 Motorways, ("the bungalow"). The transfer was taken in Mr. Hammond's sole name. He financed the purchase price of £36,000 as to approximately one half from proceeds of sale of his former flat, and as to the balance by a loan from a building society. Shortly before completion of that purchase the couple visited the property and were walking in the garden of what was about to become their new home when the following conversation took place. He said to her spontaneously:

"I'll have to put the house in my name because I have tax problems due to the fact that my wife burnt all my account books and my caravan was burnt down with all the records of my car sales in it. The tax man would be interested, and if I could prove my money had gone back into a property I'd be safeguarded."

Later the same day he mentioned to her that he was going through a divorce and that it would be in his best interests if he was to put the property into his name. Soon after completion he said to her, "Don't worry about the future because when we are married it will be half yours anyway and I'll always look after you and [the boy]."

From time to time after that, friends would say lightheartedly "When are you two going to tie the knot?" but the subject of marriage was not seriously introduced between them again. In fact, Mr. Hammond did get a divorce some years later, but he never told Miss Mitchell about it and she never asked him. By then I am sure she knew her man well enough to be aware that he was not the type to tie himself down; and it was motives of realism, as well as a natural self-respect, that held her back from pressing him on the marriage question for the remaining years of their association.

In March 1980 Mr. Hammond was able to purchase, from his own moneys, the paddock adjoining the bungalow to the south. He kept Miss Mitchell fully in the picture about this proposal and discussed it with her, but there was no conversation about its ownership. The bungalow was substantially enlarged later that year and Mr. Hammond paid the builder's bills for the extension.

The parties' second son was born on 7 January 1982. By that stage general dealing had become a larger proportion of Mr. Hammond's business than car dealing. He operated principally from home, which was good for the relationship — not only because Miss Mitchell had his company but also because she thoroughly enjoyed sharing his business interests and helping him whenever she could in placing advertisements, dealing with buyers, answering the telephone and so on. She also sold goods on his behalf through the network of friends and associates which she had used to place goods for sale on her own account. For a few months she had her own stall on Saturday mornings in a market town though this was never, like the car valeting business which followed it, a particularly profitable venture.

In the autumn and winter of 1982 to 1983 Mr. Hammond was able to enlarge the size and amenities of the bungalow property by buying two and a half acres of meadow land and some large barns which adjoined it. The fact that the barns were restricted by planning regulations to agricultural user was not seen by the couple as an obstacle to use for storage and sale purposes in connection with their various dealing activities.

These purchases of additional parcels and outbuildings were financed by Mr. Hammond in this way. On 24 August 1982 the mortgage indebtedness to the building society was replaced by a loan on his general overdraft account in favour of Barclays Bank, which loan was also used to finance the subsequent purchase of the additional field and barns.

Miss Mitchell's occupation of the bungalow as Mr. Hammond's cohabitee was known to the bank, who wished to be assured that her occupation would not impede their security. The bank manager (or representative) accordingly paid a visit to the bungalow, bringing with him the standard form of charge used when a property is owned by the customer borrower and another person is in occupation. This provided for the charge to be executed in favour of the bank separately by Mr. Hammond as "the mortgagor" and Miss Mitchell as "the occupier." The formal charging words spoke of the mortgagor and occupier as beneficial owners of the property "to the extent of their respective interests (if any) therein" and there was an express covenant by Miss Mitchell, as the occupier, postponing any right or interest she might have in the property to the claims of the bank under the charge. The discussion between the bank's representative, Mr. Hammond, and Miss Mitchell, was cursory. The bank's representative told Miss Mitchell in general terms in Mr. Hammond's presence that unless she signed the charge Mr. Hammond could not get the intended loan because she had an interest in the property. He did not specify what the interest was. She did not ask him. In her heart she believed she did have an interest, and that was enough for her. The subsequent charges executed by Mr. Hammond to secure the loan on the large field and the barns, as they were transferred to him within the following months, were in his own sole name without Miss Mitchell being involved, whether as occupier or at all.

By this time the bungalow was bursting with the household goods that had become an increasing proportion of Mr. Hammond's business; goods that he sold himself, goods that she sold on his behalf, and goods that she bought from him so as to render them, with his permission and encouragement, goods sold on her own account — in the sense that she could deal with any profit made in selling them as she pleased, without having to account to Mr. Hammond for anything more than the initial cost price.

From the outset of that activity the accounting methods of the parties had been chaotic. No formal accounts were kept at all, a lot of trading was done in cash, with money hidden in pots and pans around the house. Miss Mitchell never made a tax return at all; Mr. Hammond does pay tax to the Inland Revenue, but upon what basis has never been clear because he has not given discovery of any income tax returns. It has been impossible in those circumstances to determine with any sort of precision the proportions of their joint and several business activities. All that can be said with any certainty is that both worked hard in a buying and selling activity which they thoroughly enjoyed. He was the principal trader. She was part-time trader and part-time housewife. They employed a good deal of casual help to assist with the home and the children. He paid most of the bills. She had cash when it was needed for household expenses, and bought her own clothes and



sometimes clothes also for the children, without much inquiry as to whether the money was coming from her own activities or from his or from funds generated by their joint efforts. The nearest that either of them ever came to anything like a formal account was a series of pieces of rough paper on which Miss Mitchell jotted down particulars of moneys owed by her to Mr. Hammond for goods provided by him for resale either on her own account or on his behalf. It was her practice to show as deductions from those moneys various items of expenditure made for the benefit of the joint household. These "rolling accounts" were then approved by Mr. Hammond.

In August 1984 Mr. Hammond took a step which was to increase the scale of his commercial activity very substantially. He bought the whole stock of quality furniture and fittings belonging to a company called Morrins Furnishings Ltd., which had gone into receivership. He discussed this venture with Miss Mitchell beforehand. Both found it exciting for the scale of potential profit which it afforded. Both knew it was dangerously speculative in that the price of failure would be foreclosure by the bank on the bungalow and its various accretions, leaving them without a roof over their heads. There were indeed some anxious moments, but the venture turned out in the end to be a resounding success. Some Morrins' stock was sold direct to purchasers from the company's premises; other items were brought to the bungalow and held in the barns where they could be inspected by potential buyers. Miss Mitchell did not trade in any of the Morrins' goods on her own account, but she was active in dealing with telephone and personal inquiries from potential buyers. At the same time, she had begun to deal on her own account with furniture of rather lesser quality. She had formed, together with a dealer friend of Mr. Hammond, a partnership whose business it was to buy second-hand three piece suites which had been accepted by furniture retailers in part-exchange for new ones, and sell them on, sometimes after limited restoration, to buyers for whom she would advertise in the local press. This business, though its scale was nothing like that of the Morrins' venture, had proved profitable. Miss Mitchell kept some of the profit for her own expenses, including clothes of good quality for her personal use, spent some on the children and contributed some of it to occasional purchases of items for the home or household or in contributions to family treats or expenses. The scale of that contribution is impossible to estimate with anything approaching precision because the couple's book-keeping and accounting procedures remained no less chaotic after these new ventures than they had been before.

The Morrins' stock had included furniture of distinctive design manufactured in traditional style by a Spanish company called Soriano. In its turn, that company itself fell into receivership, and Mr. Hammond, with Miss Mitchell's encouragement and support, decided to engage in a joint venture with another dealer for the purchase and disposal of this Spanish company's stock, in very much the same way as he had run the Morrins' venture. The Soriano venture began in May 1985, at which date Mr. Hammond started a curriculum which involved being in Valencia during the week and commuting home to Essex to join Miss Mitchell and the children at weekends. Two months earlier Miss Mitchell had made a venture into the local property investment market with the purchase of a tenanted cottage at a price of £10,000 which she raised by a loan from Mr. Hammond's bank supported by his personal guarantee. As soon as the school holidays of that year, 1985, were over she took the children to join Mr. Hammond in Valencia. The whole family enjoyed the life there very much. Miss Mitchell was able to make herself useful by attending the Soriano factory fairly regularly to help in general surveillance duty — a function which became necessary because, although the company was in liquidation, its workforce had remained in occupation of its premises under a work-in, and a sharp eye had to be kept open to ensure that in all the comings and goings any goods which had been bought by Mr. Hammond's consortium did not become confused with other goods and that generally goods purchased by him did not go astray.

The Soriano venture ended in October 1985. It had very much followed the pattern of the Morrins' venture in that, although speculative and involving high risk to Mr. Hammond, whose assets, including the bungalow and its accretions, were heavily committed, it turned out in the end to be a success. Some of the Soriano furniture came to England and was sold by local representatives of Mr. Hammond from the bungalow, in whose barns it was stored.

Spain was such a success from the family point of view that the couple decided to make their base there. In October 1985 Mr. Hammond bought a bungalow ("the Spanish house") in Valencia for £38,000, including fees and expenses. He paid that from his own resources. Miss Mitchell was not then working and her absence from Essex meant that her three piece suite business had to be curtailed. Nevertheless, she was still earning enough to enable her to contribute a little from her own resources from time to time to the equipment of the Spanish house. From this time, the autumn of 1985 onwards, the children principally attended Spanish schools for some two years, although there were sufficiently substantial intervals spent by the family during that period in England for them to be able to spend the odd term at an English school. The general picture, nevertheless, was of Spain as the family base, with Mr. Hammond (whose principal dealing activities had by now shifted back to Essex following the near completion of the Soriano contract) commuting at weekends, this time in the reverse direction, i.e. working in England in the week and joining the family for the weekend in Spain.

Miss Mitchell was not working in Spain following completion of the Soriano venture, but she remained commercially active when on trips to England. In March 1986 she was able to sell the cottage for more than twice what she had paid for it, producing a profit of £11,000. Those funds were partially invested for her own benefit and partially used to contribute on an intermittent and unplanned basis, which was never very substantial, to the expenses of the English and Spanish households. She was useful during visits to England in helping in the mass disposal of a consignment of shoes which Mr. Hammond had bought as bankrupt stock and for whose disposal part of the barn space at the bungalow was converted to a temporary "shoes sale area."

In September 1987 Mr. Hammond, in order to give Miss Mitchell a business interest in Spain, bought in her name a half share in a restaurant business in Valencia. He paid £20,000 for the half share out of his own resources and, in addition, loaned the restaurant business some £26,000 by way of working capital. That proved to be a short-lived venture, although Miss Mitchell worked hard to improve the quality and appearance of the establishment. By February 1988 the couple had been forced to close the restaurant down because they had become suspicious about the financial dealings of the Spanish co-owner. Some time later the co-owner reopened the restaurant and has been running it ever since in his own sole name without accounting for any profit to Miss Mitchell, although he acknowledges that she has a half share of the assets, including the premises, of the restaurant business.

By the spring of 1988 relations between Mr. Hammond and Miss Mitchell had become strained. They were still together when they returned to England and the bungalow in May 1988; although shortly before that return Miss Mitchell had started what was to prove in the end to be only a short-lived affair with a young Spaniard in Valencia. The bungalow to which they returned was, as always, stuffed throughout with furniture, ornaments and fittings which they had accumulated during their years of dealing. Much of it had sentimental value, but they were neither of them the kind of person in whom sentiment was ever strong enough to outweigh commercial advantage. Their dealers' instincts saw to it that every object in their home, however dearly cherished, had a potential buyer in their mind's eye, if only the price was right.

Early in June 1988 Mr. Hammond bought for £12,500 a Mercedes car. Shortly afterwards, Mr. Hammond went to Spain for a brief visit and in his temporary absence Miss Mitchell made arrangements to leave him. With the help of her parents and friends she loaded a substantial quantity of furniture and effects from the bungalow into vans, which were then driven away. She herself removed the Mercedes and then made arrangements to fly to Spain to resume her affair with the young Spaniard. Mr. Hammond, whose son by his former marriage had discovered what was going on and warned his father in Spain by telephone, made arrangements to return secretly to England and confront Miss Mitchell.

He gave that confrontation the maximum dramatic effect by getting a seat (unknown to her) on the same flight to Spain as that on which Miss Mitchell was booked. Just as the aircraft was about to take off he emerged and denounced her in a way that led to a blazing row and a violent scuffle,

requiring the intervention of the cabin staff to separate them and in the end to allow Miss Mitchell at her own request to disembark.

On 22 June 1988 Mr. Hammond issued a writ in the Queen's Bench Division ("the first Queen's Bench action") claiming the return of the Mercedes and the goods removed by Miss Mitchell, whose value he now alleges to be some £50,000. Two days later he launched wardship proceedings in which after bitter controversy, the future care of and access to the two boys were due eventually to be decided by other judges. Before June was over, a third set of proceedings had been launched, this time in the form of a claim by Miss Mitchell under section 30 of the Law of Property Act 1925 to a beneficial interest in the bungalow. That was brought by originating summons in the Family Division.

Peace unexpectedly broke out in the autumn of 1988 when the couple became reunited in England at the bungalow for some three months, and the children for a time returned to live with them from the maternal grandparents' home where they had been taken after the initial separation.

Then, at the end of February 1989, Miss Mitchell left Mr. Hammond for the last time, taking with her on this occasion an XJS Jaguar and items of clothing and jewellery. The eventual upshot of this final separation was a second writ by Mr. Hammond in the Queen's Bench Division ("the second Queen's Bench action"), in which he claimed the return of those chattels and also repayment of £46,500, being the total of the moneys laid out by him in connection with the purchase of the half share of the Spanish restaurant and his advance of working capital to that business. Miss Mitchell counterclaimed in the second Queen's Bench action for the return of items still in the bungalow and also in the Spanish house, all of which were alleged to be her sole property. By her defence in that action she submitted to treat the half share in the Spanish restaurant as joint property, asserting in the alternative that all moneys paid by Mr. Hammond in connection with it were a gift.

The goods claimed and counterclaimed in the two Queen's Bench actions amounted to some 160 items in all. They were incorporated, with the approval of the court, in a Scott Schedule. Those actions were in due course transferred to the Family Division for hearing at the same time as Miss Mitchell's section 30 claim, which by the date of the hearing had become enlarged to include a claim to a beneficial interest in the Spanish house as well as the bungalow.

Only a few days before this present hearing began, yet another proceeding was added to the court's agenda in the form of a summons by Miss Mitchell under section 12 of the Family Law Reform Act 1987 for secured or lump sum capital provision for the children's maintenance.

The assets in dispute in this unwieldy bundle of different proceedings consist of (1) the bungalow, as now represented by the couple's original home, and the various accretions, including the barns. That property has a total vacant possession market value in round figures of £400,000, subject to a mortgage of £150,000, leaving a net equity of some £250,000. (2) The Scott Schedule items. No independent valuations have been agreed, but it is sufficient for present purposes to attribute to these items a very approximate value of £75,000. (3) The Spanish house. This property is unmortgaged and has an agreed value of £67,000. (4) The half share in the Spanish restaurant. This business, including its premises, has an agreed value of £106,000, making the value of a one half share on sale or dissolution, assuming it to be realisable at all, worth £53,000.

By the end of this hearing the parties had seen the wisdom of making all necessary amendments to their pleadings to enable the various claims and cross-claims to be epitomised in the form of an inquiry as to the beneficial entitlements to all these assets. Inquiries of that kind are already familiar in the Chancery Division when adjudging claims between partners and joint venturers, and there is clearly a good deal to be said for following the same path in the Family Division whenever it is called upon to resolve issues relating to the ownership of assets formerly enjoyed jointly by the parties to an unmarried association.

That completes the account of the material to which the law requires me in determining beneficial title to apply the principles enunciated in *Lloyds Bank plc. v. Rosset* [1991] 1 A.C. 107 and *Grant v. Edwards* [1986] Ch. 638 . It will involve asking this question first: is there any, and if so which, property which has been the subject of some agreement, arrangement or understanding reached between the parties on the basis of express discussion to the effect that such property is to be shared beneficially; and (if there is) has Miss Mitchell shown herself to have acted to her detriment or significantly altered her position in reliance on the agreement so as to give rise to a constructive trust or proprietary estoppel?

The answer to that question should, in my judgment, in both its parts be "Yes." In relation to the bungalow there was express discussion on the occasions I have already described which, although not directed with any precision as to proprietary interests, was sufficient to amount to an understanding at least that the bungalow was to be shared beneficially. It will, of course, be a question of fact and degree in every case where A and B acquire Blackacre in A's sole name with a mutual expectation of a shared beneficial interest, and thereafter enlarge it by extension of existing premises or the purchase in A's sole name of an adjoining property Whiteacre, whether B's beneficial interest was intended to extend to the enlarged hereditament. That can only be determined on a review of the whole course of dealing between the parties. I am satisfied in the present case that the parties intended the bungalow, as it became successively enlarged by addition to its own original structure and by the purchase of the adjoining parcels of land and barns, to be subject to the same understanding as governed the original property. Miss Mitchell, by her participation wholeheartedly in what may loosely be called the commercial activities based on the bungalow, not only acted consistently with that view of the situation but also acted to her detriment in that she gave her full support on two occasions to speculative ventures which, had they turned out unfavourably, might have involved the entire bungalow property being sold up to repay the bank an indebtedness to which the house and land were all committed up to the hilt.

There remains the question in relation to the bungalow of what the proportion of Miss Mitchell's beneficial interest should be held to be. This is not an area where the maxim that "equality is equity" falls to be applied unthinkingly. That is plain from the lesser proportions awarded in both *Grant v. Edwards* [1986] Ch. 638 and in *Eves v. Eves* [1975] 1 W.L.R. 1338 . Nevertheless, when account is taken of the full circumstances of this unusual case, and when Miss Mitchell's contribution as mother/helper/unpaid assistant and at times financial supporter to the family prosperity generated by Mr. Hammond's dealing activities is judged for its proper effect, it seems right to me that her beneficial interest in the bungalow should be held to be one half.

The next question, arising under the *Lloyds Bank Plc. v. Rosset* [1991] 1 A.C. 107 formula, is whether there is any property in regard to which an intention to share a beneficial ownership should be imputed to the parties in the absence of any express discussion leading to an agreement or understanding to that effect. Miss Mitchell asserts that there is such a property, namely, the Spanish house. She acknowledges that there was no previous discussion remotely touching upon the terms of its ownership, but her counsel, Miss Gill, claims that when the parties' whole course of dealing is examined (even according to the more rigorous standards which apply when intention has to be inferred from conduct alone) the intention to constitute Mr. Hammond a constructive trustee for Miss Mitchell of part of the beneficial interest in the Spanish house becomes manifest. To support that she relies on the cases (both involving married couples and neither of which was cited in *Lloyds Bank v. Rosset*) of *Nixon v. Nixon* [1969] 1 W.L.R. 1676, and *Muetzel v. Muetzel* [1970] 1 W.L.R. 188 . I reject that submission. Useful at times though her activities may have been in Spain during the fulfilment of the Soriano venture, Miss Mitchell's activities generally fell a long way short of justifying any inference of intended proprietary interest.

In turning next to the Scott Schedule chattels, whose disputed ownership occupied so large a proportion of this protracted hearing, I would wish to express my support for the recent comments in the Chancery Division of Millett J. in *Windeler v. Whitehall* [1990] F.C.R. 268, 279, to the effect that sorting out the ownership of chattels bought by parties who have been living together, is something that the parties should be expected to achieve by agreement for themselves without the

necessity of a court hearing. I would add, in the light of experience in the present case, that agreement is strongly preferable to crude acts of self-help by removing chattels from the home on the break-up of the association. Miss Mitchell's actions in this regard were thoroughly deplorable. Nevertheless, the parties have required me to deal with the chattels and I will do so.

[His Lordship dealt with the ownership of the chattels, the parties' interest in the Spanish restaurant and maintenance of the children, and continued:] The marked increase in the proportion of the population living together outside marriage, as indicated by the statistics published in Family Law (1990) 20 F.L.R. 442, suggests that cases of this kind are liable to come before the courts with increasing frequency, and many of them are likely to be brought (or to end up) in the Family Division. The 19 days of High Court hearing time devoted to this one dispute will not have been wasted if certain lessons are learned from it for the future.

The first relates to the form of the proceedings. The unwieldy fusion of Queen's Bench and Family Division proceedings which has occurred in the present case must somehow be avoided for the future. Whatever form the proceedings take in cases of this kind, and whatever the High Court Division or the county court in which the process is initiated, it must be a matter of prime concern to the parties' advisers and to the district judge or master before whom they come in the first instance to see that all possible issues, including those of maintenance, are raised at the earliest stage so that an informed judgment can be made as to the forum and the procedure which will provide the quickest and most effective means of resolving them.

The next relates to disputes over chattels. While no one suggests that English law recognises or should develop a doctrine of community of property regarding the household goods of those who settle for an unmarried union, the parties must expect the court in ordinary cases to adopt a robust allegiance to the maxim that "equality is equity," if only in the interests of fulfilling the equally salutary maxim "sit finis litis." If it is really necessary to bring issues of disputed ownership of household chattels to adjudication, the proper way of doing it is a claim for a declaration or inquiry as to the beneficial interest, supported with appropriate affidavit evidence, on lines similar to the procedure for resolving disputes under section 17 of the Married Women's Property Act 1882 (45 & 46 Vict. c. 75). It is not normally appropriate to proceed by actions framed in conversion or detinue.

The third concerns discovery. There is no procedure for automatic discovery in the Family Division, and formal orders for discovery are relatively rare in a jurisdiction which tends to prefer reliance on a rule 77 questionnaire. That may well be sufficient for financial disputes between married spouses which lie almost entirely in discretion. It is not at all appropriate to disputes between unmarried cohabitants, which lie wholly in proprietary claims based upon evidence. Discovery orders should therefore be made early in the proceedings and enforced strictly. The alternative would be to run the risk of suffering the experience of the present case, in which the court's hearing time and the patience of the parties' advisers were both sorely strained as a result of each side coming forward day by day as the hearing proceeded with sheaves of documents which ought to have been produced many months before.

The fourth relates, finally, to the formulation of the claim to a beneficial interest in more substantial assets, such as property or investments. The primary emphasis accorded by the law in cases of this kind to express discussions between the parties ("however imperfectly remembered and however imprecise their terms") means that the tenderest exchanges of a common law courtship may assume an unforeseen significance many years later when they are brought under equity's microscope and subjected to an analysis under which many thousands of pounds of value may be liable to turn on fine questions as to whether the relevant words were spoken in earnest or in dalliance and with or without representational intent. This requires that the express discussions to which the court's initial inquiries will be addressed should be pleaded in the greatest detail, both as to language and as to circumstance. In the Family Division, where there is no procedure for pleadings or particulars, the degree of particularity with which the relevant discussions are asserted in the claimant's initial affidavit will be of prime importance for both sides. From the claimant's point of view, failure to achieve particularity at that stage may cause the claim to founder

for vagueness at the trial where the affidavit will stand as her evidence in chief, on which she will be unlikely to be allowed to enlarge orally before she is cross-examined on it. From the respondent's point of view, he must be entitled, in an area of law where the nuances of language are all-important, to know exactly what case he has to meet.

Particularity will have the further advantage to both sides of enabling the strength of the claim to be assessed by the parties' advisers at an early stage, with sufficient definition to provide a fair basis for reasonable compromise. That will be an especially desirable objective in the case of separating unmarried couples, whose distress or bitterness is often found, paradoxically, to have been increased rather than diminished by their decision not to undertake a commitment to each other in marriage. I will hear counsel as to the precise form of order necessary to give effect to this judgment and on the issue of costs.

## 8. ***Hedley Byrne v. Heller* [1964] AC 465: House of Lords**

House of Lords

Lord Reid, Lord Morris of Borth-Y-Gest, Lord Hodson, Lord Devlin and Lord Pearce.

1963 Feb. 25, 26, 27, 28; Mar. 4, 5, 6, 7; May 28.

Negligence—Duty of care to Whom?—Careless misrepresentation—Bankers—References regarding company given by bankers to other bankers at customer's request—Communicated to customers inquiring about company's credit—worthiness—Express disclaimer of responsibility—Whether a special relationship creating duty of care—Whether action against bankers maintainable.

Banking—Reference by bankers—Careless misrepresentation—References not justified—Plaintiffs' financial loss—Whether a special relationship creating a duty of care—Whether action against bankers maintainable.

The appellants were advertising agents, who had placed substantial forward advertising orders for a company on terms by which they, the appellants, were personally liable for the cost of the orders. They asked their bankers to inquire into the company's financial stability and their bankers made inquiries of the respondents, who were the company's bankers. The respondents gave favourable references but stipulated that these were "without responsibility." In reliance on these references the appellants placed orders which resulted in a loss of £17,000. They brought an action against the respondents for damages for negligence:-

Held, that a negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment (post, pp. 486, 502, 514). However, since here there was an express disclaimer of responsibility, no such duty was, in any event, implied.

*Nocton v. Lord Ashburton* [1914] A.C. 932; 30 T.L.R. 602, H.L. applied.

*Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164; [1951] 1 T.L.R. 371; [1951] 1 All E.R. 426, C.A., overruled.

*Le Lievre v. Gould* [1893] 1 Q.B. 491; 9 T.L.R. 243, C.A. explained and not followed

*Per* Lord Morris of Borth-y-Gest and Lord Hodson. *Semble*, if a banker gives a reference in the form of a brief expression of opinion in regard to credit-worthiness, he does not accept, and there is not expected of him, any higher duty than that of giving an honest answer.

*Per* Lord Devlin. The duty of care arises where the responsibility is voluntarily accepted or undertaken either generally, where a general relationship is created, or specifically in relation to a particular transaction.

*Per* Lord Pearce. To import such a duty the representation must normally concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer.

*Decision of the Court of Appeal* [1962] 1 Q.B. 396; [1961] 3 W.L.R. 1225; [1961] 3 All E.R. 891, C.A. affirmed on different grounds.

APPEAL from the Court of Appeal (Ormerod, Pearson and Harman L.JJ.).

This was an appeal (by leave of the Court of Appeal) by the appellants, Hedley Byrne & Co. Ltd., who were the plaintiffs in the action, from an order of the Court of Appeal dated October 18, 1961, affirming the judgment of McNair J., dated December 20, 1960, in favour of the respondents, Heller & Partners Ltd., the defendants in the action, whereby it was held that the action failed on a point of law, but that otherwise the damages recoverable by the appellants would have been £15,454 3s. 6d. with interest at the rate of 4 per cent. per annum from January 1, 1959.

The appellants were a firm of advertising agents. The respondents were merchant bankers. Towards the end of 1957 the appellants on behalf of a customer, Easipower Ltd. placed some small orders for advertising. Later proposals were made to them for an advertising programme involving the expenditure of £100,000 and in November, 1957, they received indirectly from Martin's Bank Ltd., Easipower's then bankers, a reference reporting Easipower to be "a respectably constituted company whose trading connection is expanding speedily. We consider the company to be quite good for its engagements." They placed on behalf of Easipower on credit terms substantial orders for advertising time on television programmes and for advertising space in certain newspapers on terms that they themselves became personally liable to the television and newspaper companies.

The appellants, becoming doubtful of the financial position of Easipower, wanted a bankers' report concerning the company which then had an account with the respondents. They themselves banked at the Piccadilly branch of the National Provincial Bank Ltd. which they asked to obtain a report. The Piccadilly branch communicated with its City office, a representative of which telephoned the respondents on August 18, 1958, and it was common ground that a contemporaneous note of the ensuing conversation was accurate: "Heller & Partners Ltd. Minute of telephone conversation Call from National Provincial Bank Ltd., 15, Bishopsgate, E.C.2. 18.8.58. Person called: L. Heller, re Easipower Ltd. They wanted to know in confidence and without responsibility on our part, the respectability and standing of Easipower Ltd., and whether they would be good for an advertising contract for £8,000 to £9,000. I replied, the company recently opened an account with us. Believed to be respectably constituted and considered good for its normal business engagements. The company is a subsidiary of Pera Industries Ltd., which is in liquidation, but we understand that the managing director, Mr. Williams, is endeavouring to buy the shares of Easipower Ltd. from the liquidator. We believe that the company would not undertake any commitments they were unable to fulfil." In due course this answer was communicated orally by the Piccadilly branch of National Provincial to the appellants. On August 21, 1958, a letter of confirmation was sent to them by that branch. The letter had the headings "confidential" and "for your private use and without responsibility on the part of this bank or the manager." In the letter the oral answer which the respondents had given to the City office was passed on with the prefatory words "In reply to your telephoned inquiry of August 18, bankers say ..." The information had been given by the respondents gratuitously.

On November 4, 1958, a letter was sent to the Piccadilly branch of National Provincial on behalf of the appellants saying: "I have been requested by the directors to again ask you to check the financial structure and status of Easipower Ltd." After some particular references, the letter concluded: "I would be appreciative if you could make your check as exhaustive as you reasonably can." on November 7, 1958, the City office of National Provincial wrote the respondents a letter headed "private and confidential" in the following terms: "Dear Sir, We shall be obliged by your opinion in confidence as to the respectability and standing of Easipower Ltd., 27 Albemarle Street, London, W.1, and by stating whether you consider them trustworthy, in the way of business, to the extent of £100,000 per annum advertising contract. Yours faithfully ..." On November 11, 1958, the respondents replied in a letter headed:



## CONFIDENTIAL

"For your private use and without responsibility on the part of this bank or its officials."

The letter continued:

"Dear Sir, In reply to your inquiring letter of 7th instant we beg to advise:  
Re E..... Ltd.

"Respectably constituted company, considered good for its ordinary business engagements. Your figures are larger than we are accustomed to see.

Yours faithfully,"Per pro. Heller & Partners Ltd.

On November 14 1958, the Piccadilly branch of National Provincial wrote to the appellants, passing on what the respondents had stated in this letter, heading their own letter "Confidential. For your private use and without responsibility on the part of this bank or the manager" and prefacing it with the words: "In reply to your inquiry letter of November 4, bankers say ..."

The appellants relied on these statements and as a result they lost sums, calculated as £17,661 18s. 6d. in their statement of claim, when Easipower went into liquidation. In this action they sought to recover this loss from the respondents as damages on the ground that their replies were given negligently and in breach of the respondents' duty to exercise care in giving them. An allegation of fraud was originally made but was abandoned. McNair J. held that the respondents were negligent but that they owed no duty of care to the appellants. The Court of Appeal likewise held that there was no duty of care and it was therefore unnecessary to consider whether the finding of negligence was correct.

*Gerald Gardiner Q.C., D. G. A. Lowe and B. Anns* for the appellants. It is submitted: (1) *Donoghue v. Stevenson* is part of the law of England in its statement of the duty to act with care. It is authority for holding that a false statement made carelessly and acted upon by the person to whom it is made to his detriment is actionable, though no contractual relationship may exist between them. In *Heaven v. Pender* the majority of the court were wrong and the minority view was right. (2) Where a man holds himself out as exercising special skill or where he exercises a particular profession, he is under a duty to exercise skill and care. A surgeon or a doctor or a solicitor or a surveyor owes a duty to act with reasonable skill and care, whether or not he is acting gratuitously. (3) These particular defendants in the particular and highly peculiar circumstances of this case did owe a duty of care to these particular plaintiffs.

The old cases on professional services are relevant: *Shiells v. Blackburne*; *Wilkinson v. Coverdale*; *Gladwell v. Steggall* and *Donaldson v. Haldane*. *George v. Skivington* was followed in *Cann v. Willson*, a case rightly decided and wrongly overruled in *Le Lievre v. Gould*, which is a troublesome case for the appellants, because it was rightly decided, but on the wrong basis. *Derry v. Peek* did not establish that innocent but negligent misrepresentation cannot give rise to a cause of action. *Nocton v. Lord Ashburton*, which is relied on, indicates that a duty of care can be inferred in the present circumstances. Estoppel is not put forward.

*Donoghue v. Stevenson* is in the main stream of judicial decision. Already *Macpherson v. Buick Motor Co.* had been decided in the same way in the United States. The distinction between a negligent act and a negligent word in England is not clear. It would be strange if a person who handled his pen so carelessly as to put out X's eye were liable to pay damages, but not if he handled it so carelessly in writing, that X was financially ruined. The great advantage of the common law is the readiness of the judges to adapt the law to changing conditions.

As to the application of *Donoghue v. Stevenson*, see *Grant v. Australian Knitting Mills Ltd.* and *Barnes v. Irwell Valley Water Board*. *Old Gate Estates Ltd. v. Toplis & Harding & Russell* was

wrongly decided. See also *Sharp v. Avery and Kenwood*; *Watson v. Buckley, Owen, Garrett & Co. Ltd.*; *Haseldine v. C. A. Daw & Son Ltd.*; *Bourhill v. Young*; *Woods v. Duncan*; *Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners)* and *Denny v. Supplies & Transport Co. Ltd.* *Candler v. Crane, Christmas & Co.* was wrongly decided by the majority and the dissenting judgment of Denning L.J. was correct. On the law as there laid down compare the American Restatement of the Law of Torts, Vol. III, pp. 122-123, para. 552, comment (a); *Glanzer v. Shepherd*; *International Products Co. v. Erie Railroad Co.*; *Mulroy v. Wright*; *Doyle v. Chatham & Phoenix National Bank*; *Ultramares Corporation v. Touche* and *Edwards v. Lamb*. The result reached in a large number of the American cases shows that, even though there is no contract, there may be special circumstances giving rise to a fiduciary relationship. In *Candler's* case the accountants were persons who had assumed a special skill and were in a position to know the facts required by the investor, who would act on the information given and would suffer damage if it was not accurate. On those facts the defendants should have been held liable and in the present case the same principles should apply to bankers in a state of facts which produces the same situation. It makes no difference whether or not the person giving the information is interested in the result.

Reliance is placed on *Swift v. Jewsbury*, in which the manager of a bank was held liable for knowingly making a false statement of this kind. See also *Hosegood v. Bull* and *Hirst v. West Riding Union Banking Co. Ltd.* It is conceded that, as was held in *Parsons v. Barclay & Co. Ltd.*, the bankers were under no duty to make special inquiries before giving the references. *Robinson v. National Bank of Scotland Ltd.*, should not be followed in modern times, and, in any event, the facts were different from those of the present case, because in that case the pursuer did not rely on the report given as the report in the present case was relied on. Although up to the time of the decision of that case it may have been reasonable to confine the obligation arising out of the giving of a banker's reference to giving an honest answer, modern business practice imposes the further obligation that there must be no negligence. In that case Lord Haldane did not exclude the possibility that in special circumstances a duty might arise.

Reliance is also placed on *Banbury v. Bank of Montreal*; *Evans v. Barclays Bank*; *Batts Combe Quarry Co. v. Barclays Bank Ltd.*; *Woods v. Martins Bank Ltd.*; *Plowright v. Lambert and Clayton v. Woodman & Son (Builders) Ltd.* See also Halsbury's Laws of England, 3rd ed., Vol. II, p. 241, para. 455; Emanuel on Banking, 3rd ed., p. 19, and Paget on Banking, 6th ed., pp. 139-143. As to the application of the principle *stare decisis*, see *Caledonian Railway Co. v. Walker's Trustees*; *Quinn v. Leatham* and *Midland Silicones Ltd. v. Scruttons Ltd.*

In the present case if English law did not provide a remedy, it would be an unfortunate gap. It would be a discredit to English law if, however fraudulent or negligent a bank might be in giving such information, there was no remedy against it. If there is no such duty as the appellants submit, it could be said successfully that the information given was either not given in writing or not under seal. But on the correct application of *Donoghue v. Stevenson* there should be judgment for the appellants. It should apply to words as well as deeds. Behind it are the principles which have been applied to distributors of goods, to architects in relation to workmen on a building, to advice given by bankers and to motor-cyclists playing "follow my leader." It was evident that if the bank in the present case did not exercise due care it would be likely to cause loss to the person for whom the report was made and who could do nothing to avert the damage. The bank was in a special position to know the facts. The correct application of the principle in *Donoghue v. Stevenson*, which is not limited to damage to person or property, imposes on it a duty to take reasonable care. *Robinson's* case is not to be treated as a decision that no banker can ever owe such a duty to a person to whom he gives a reference; it only held that the bank there in question was not liable in fraud because it had not been fraudulent. Giving references and certificates is part of a banker's professional work in which, like a doctor, he is to exercise reasonable care and skill. Bank customers are now taken to have consented impliedly to their banks giving references with regard to them, unless they specifically forbid it. At the time when *Tournier v. National Provincial and Union Bank of England* was decided, it was the reverse. Bankers' references are important in the business world. They should be integrated in the banking system and there should be a duty of care in regard to them. It has never been suggested that if a person with professional skill

undertakes work so that he is bound to exercise reasonable care and skill, there is a rule limiting liability to a particular sort of damage, physical damage and damage to property, for example, in the case of a doctor who misdiagnoses a patient.

In summary, the information as to creditworthiness given was intended by the respondents to be communicated by the National Provincial Bank to a customer, whose identity was immaterial to the respondents, for that customer's use, and in giving that information, knowing that it would be relied on by some third party, such as the appellants, there was a duty imposed on the respondents to use reasonable care. In fact the information the respondents gave was calculated to give a false impression and the person giving it should have realised that. There is no reason in principle or authority why losses flowing from a careless statement of this description should not be recoverable, since there is the necessary relationship of proximity.

*John Foster Q.C., J. M. Shaw and L. Blom-Cooper* for the respondents. Bankers in giving references use guarded terms because to speak straight out would be a breach of duty to their customers. Because of that duty it is necessary for them to say "light grey" instead of "black." In giving this information the respondents had no interest of their own. The service was given gratuitously. Further, the evidence shows that they did not know that the National Provincial Bank required this information for the appellants or any other customer and in giving it they did not have in mind any definite person or class of persons. They knew nothing of the appellants and never intended the information to be communicated to them. The reference was marked "confidential" and given on the express understanding that no responsibility was incurred. So far as the respondents were concerned, the National Provincial Bank might have been wanting to know the financial standing of a would-be customer. At most it might have been inferred that the National Provincial Bank required the information as background for advising one of their customers. An undisclosed principal is not a "neighbour" within the rule in *Donoghue v. Stevenson*. This case does not come within the ambit of the principle enunciated in that decision. There is no liability here. The information was only an expression of opinion. If there had been a liability, it would not be one which could be taken over by third parties like the appellants, to whom no duty was owed. The attitude of the respondents was: (1) They did not contemplate anyone but the National Provincial Bank being interested. (2) The information was given personally and confidentially to the National Provincial Bank and so, even if the person who gave it contemplated that there might be a customer who was interested, it would be a customer hearing the National Provincial Bank's version of the situation. (3) Even in the case of a written document sent to the National Provincial Bank, there would be ample opportunity for that bank to check its contents. The spoken or written word is not packaged, so that it cannot be examined like the ginger-beer bottle in *Donoghue v. Stevenson*, which allowed no chance of intermediate examination and so created a proximity. This information could be examined.

There is no liability for negligent misrepresentation unless through a careless misstatement something is created or a situation arises which is dangerous to life or limb or harmful to property, for example, a negligent misstatement that it is safe to go into a cellar or to use a lift, when it is not, or a statement by a doctor that a person has not got leprosy when he has. In those cases the safety is part of the *res gestae*. There is no liability for innocent misrepresentation: see *Heilbut, Symons & Co. v. Buckleton*.

There being no general duty not to make careless statements, liability can only arise under three categories, which are exhaustive and under which a special duty is created. That duty (a) must be contractual or (b) must be fiduciary or (c) must arise from a relationship of proximity, the breach causing financial loss which flows from physical damage to the person or property of the plaintiff. To extend the law to create a general duty would open the floodgates of litigation.

As to the dichotomy between warranty and representation, see *Hopkins v. Tanqueray*, *Angus v. Clifford*; *Low v. Bouverie*; *Scholes v. Brook* and *Thiodon v. Tindall*. Where there is a warranty there is a condition, and the person who gives it is liable in damages if he gives an untrue answer. The test in the case of a warranty is whether there is an intention to contract. It is an old-established

principle that damages cannot be obtained for innocent misrepresentation unless there is a warranty.

When a person sets up as an investment adviser, that imposes on him a duty to the persons he advises. But no duty is raised simply by asking a person for advice. By asking a policeman the way one does not make him one's traffic adviser. Compare *Woods v. Martins Bank Ltd.* See also *De la Bere v. Pearson Ltd.* If the appellants' contentions are right the anomalous result might be produced that on the decision of *Akerhielm v. De Mare* a negligent defendant might be under a heavier liability than a fraudulent defendant.

*Derry v. Peek* ruled out any liability not arising from a fiduciary relationship and that indicates that the area was not covered by *Nocton's* case. See also *Humphrey v. Bowers*. If A is under a duty of care to B in contract, it is clear that no *jus quaesitum tertio* arises. Nor does a right of action in X arise when A has agreed with B to do something for the benefit of X. Accordingly, it would be strange if a *jus quaesitum tertio* could be inferred here. See also *Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners)*. In *Love v. Mack* such a special duty as is here suggested would certainly have been invoked if it had existed. See also *Heskell v. Continental Express Ltd.*; *Groom v. Crocker*; *Everett v. Griffiths*; *Herschel v. Mrupi* and *Tournier v. National Provincial & Union Bank of England*. The present case cannot be distinguished from *Robinson v. National Bank of Scotland* in the House of Lords, where it was laid down as a general rule that a banker giving an inquirer a reference as to the credit of a customer owed no duty to that inquirer except to answer honestly. No relationship fitting that case can now be formulated so as to create a liability.

One transaction, such as the one in the present case, cannot raise a relationship. In the end it is a matter of degree. To give advice is also quite different from expressing an opinion. To say "I advise you to go to Manchester" is very different from saying "In my opinion the road to Manchester is clear." A person asking one's advice about investments is in a very different position from a person asking one's opinion. In the latter case there can be no fiduciary relationship. To give advice does not correspond to the situation when one bank asks another about the credit situation of X. Banks must clearly reserve to themselves the right not to answer questions about their customers. There is no difference in principle between a query by a bank on behalf of one of its customers and a query by that customer. No duty arose here. See by analogy *Australian Steam Shipping Co. Ltd. v. Devitt* and *Fish v. Kelly*. If one goes into a plumber's shop to ask his advice about one's plumbing system, that mere situation does not create a fiduciary relationship so that, if he gives one bad advice, he is liable in damages. *Thomson v. Schmitt* is relied on. From a study of *Nocton's* case, on which the appellants relied, it appears that their case depends on a distinction made a long time ago, brought in by a side-wind and not in accordance with the current of the law. See also *Kennedy v. Panama, New Zealand & Australian Royal Mail Co. Ltd.*

The categories in which there exists a special duty to take care are fixed and exhaustive, as was rightly decided in *Candler v. Crane, Christmas & Co*, which is in accordance with the earlier authorities and with established principle.

When one is testing the duty of care there is a difference in kind between a physical act and words. The approach to negligent misstatement must be different. In the case of words, in order to create a liability, there must be an intention that the person to whom they are directed shall act on them in the manner which occasions the loss to him. Otherwise the effect on the whole community would be very grave and confusion would be created in many aspects of the law. One must distinguish in principle between cases where financial loss is caused through physical injury and where it is caused directly. The thing done is different when it is a case of mere words.

As to the American decisions, in *Glanzer v. Shepherd* there were special facts on which it was held that there existed a duty. See also *International Products Co. v. Erie Railroad Co.* But the *Ultramares* case is helpful. It demonstrates that *Candler's* case would have been decided in the same way in America as in England. It indicates that in such circumstances as the present there is

no intention to create a legal relationship and no duty should be inferred. See also the American Restatement of the Law of Torts, Vol. III, p. 71, para. 531.

Reliance is also placed on *Peek v. Gurney*; *Halsey v. Brotherhood*; *Scholfield v. Earl of Londesborough*; *Rutter v. Palmer*; *Ashdown v. Samuel Williams & Sons Ltd.* and *Sinclair v. Cleary*. See also "Misrepresentation as Deceit, Negligence or Warranty," by Francis H. Bohlen (1929) 42 Harvard Law Review 733; "Liability in Negligence for False Statements," by W. L. Morrison (1951) 67 Law Quarterly Review 212, 214-215, and "Liability in Tort for Negligent Statements," by G. W. Paton (1947) 25 Canadian Bar Review 123.

In summary, the finding of McNair J. that there was negligence in giving the reference was incorrect on the evidence. Even if there had been negligence, the respondents would not have been liable, because there was no duty on them to take care. No special relationship was created imposing such a duty on them. They were acting gratuitously and they expressly disclaimed all responsibility. The appellants had ample opportunity to check the information given and the damage they suffered did not flow from the misrepresentation. If the law had been as the appellants submit, many authorities would have been decided otherwise than they were.

*J. M. Shaw* following. In the statement of claim there was no allegation of any special duty owed by the respondents to the appellants. The relationship between the respondents and Easipower, which was said to constitute a special relationship, was pleaded in the statement of claim as particulars of negligence and this was the only relevance of it. There is nothing to distinguish *Robinson's* case from the present one.

*Gerald Gardiner Q. C.* in reply. In considering the development of this branch of the law the American cases are significant: *Macpherson v. Buick Motor Co.* and *Devlin v. Smith*. The *Ultramares* case is the American equivalent of *Le Lievre v. Gould*. Though South Africa has a different system of law, its decisions in this field are almost identical with the American: *Perlman v. Zoukendyk* and *Herschel v. Mrupi*. It is substantially similar to the law expressed in the American Restatement.

In *Candler's* case the accounts were got out for the sole purpose of the plaintiff seeing them. The duty was imposed on the defendants when they started getting out those accounts, knowing that Candler was going to see them for the purpose of deciding whether or not to invest in the business in question. There is no difficulty in developing the law laid down in *Donoghue v. Stevenson* <sup>97</sup> to cover cases of this kind. The law imposes a duty to take care on a person acting in such circumstances that, if he stopped to think, he would know that someone else's person or property would be injured by his negligence. This principle should be extended to the field of skilled persons who know that, if they do not use their skill and care, someone will be damaged. When a professional man undertakes to do a professional job and provides information or advice, whether directly or through an agent, knowing that a sum of money depends on it, this imposes on him a duty of care. The fact that in the case of a warranty there must be an intention to contract is true but irrelevant because that is in the realm of contract, while this is in the realm of tort. Section 14 of the Sale of Goods Act, 1893, which was a consolidating Act, dealing with the law as it already stood, embodied the conception that if a seller sold something knowing that it was for a particular purpose, he owed a duty to the purchaser. Reliance is placed on *Nocton's* case, treating *Derry v. Peek* wholly as an action founded on deceit. See also *Scholes v. Brook*; *De la Bere v. Pearson Ltd.*; *Thiodon v. Tindall*; *Edwards v. Mallan*; *Thomson v. Schmitt*; *Everett v. Griffiths*; *Love v. Mack*; *Shiells v. Blackburne*; *Doorman v. Jenkins*; *Whitehead v. Greetar*; *Fish v. Kelly* and *Sorrell v. Smith*. In *Robinson v. National Bank of Scotland* the decision turned on the Lord Ordinary's view of the facts, which was accepted by the House of Lords. *Candler's* case was discussed in an article by Warren A. Seavey (1951) 67 Law Quarterly Review 466.

Here a tort was committed and accordingly it does not matter what was in the mind of the person who gave the information. If what one has done amounts to a tort, it is no answer to an action to say that one acted from the best of motives. If one is in the field of the imposition of a duty, that

duty is imposed whether or not the defendant thought that he owed it. In the present case the law imposed on the respondents a duty towards anyone who might be injured by their negligence, as in *Donoghue v. Stevenson*. A banker is not obliged to give this sort of information, but, if he does, the law imposes on him a duty to take care. In such a case a defendant has open to him all the usual defences, just as in a case of negligent driving, when an injured passenger is suing, the defendant may rely on the principle *volenti non fit injuria* or that the passenger has agreed that there is to be no liability for any negligence by the driver. It would be strange if in the present circumstances there was a tort in which one could not recover pecuniary loss suffered. The result of upholding the appellants' contentions would not be to open the floodgates of litigation.

The primary contentions of the appellants are: (1) The correct application of *Donoghue v. Stevenson* results in the conclusion that the appellants are entitled to recover and that *Candler's* case was wrongly decided. (2) The appellants are entitled to recover because due care was not exercised by the respondents. (3) on the evidence a fiduciary relationship was created: see *Plowright v. Lambert*. *Woods v. Martins Bank Ltd.* was rightly decided.

If liability for negligence is to be limited, it must be limited in clear terms: *Olley v. Marlborough Court Ltd.*; *Canada Steamship Lines Ltd. v. The King* and *White v. John Warwick & Co. Ltd.*

There is no hardship or unfairness in making a bank responsible for exercising care in giving references. If the respondents wanted to make a contract whereby the persons on whose behalf the inquiries were made were to have no right of action for negligence, they should have made this clear. To mark the communication "confidential" and "without responsibility" is a mere "rubber stamp" routine. Such vague language cannot save the bank from liability.

Their Lordships took time for consideration.

**May 28**

## **LORD REID**

My Lords, this case raises the important question whether and in what circumstances a person can recover damages for loss suffered by reason of his having relied on an innocent but negligent misrepresentation. I cannot do better than adopt the following statement of the case from the judgment of McNair J.: "This case raised certain interesting questions of law as to the liability of bankers giving references as to the credit-worthiness of their customers. The plaintiffs are a firm of advertising agents. The defendants are merchant bankers. In outline, the plaintiffs' case against the defendants is that, having placed on behalf of a client, Easipower Ltd., on credit terms substantial orders for advertising time on television programmes and for advertising space in certain newspapers on terms under which they, the plaintiffs, became personally liable to the television and newspaper companies, they caused inquiries to be made through their own bank of the defendants as to the credit-worthiness of Easipower Ltd. who were customers of the defendants and were given by the defendants satisfactory references. These references turned out not to be justified, and the plaintiffs claim that in reliance on the references, which they had no reason to question, they refrained from cancelling the orders so as to relieve themselves of their current liabilities."

[His Lordship stated the facts and continued:] The appellants now seek to recover this loss from the respondents as damages on the ground that these replies were given negligently and in breach of the respondents' duty to exercise care in giving them. In his judgment McNair J. said: "On the assumption stated above as to the existence of the duty, I have no hesitation in holding (1) that Mr. Heller was guilty of negligence in giving such a reference without making plain - as he did not - that it was intended to be a very guarded reference, and (2) that properly understood according to its ordinary and natural meaning the reference was not justified by facts known to Mr. Heller."

Before your Lordships the respondents were anxious to contest this finding, but your Lordships found it unnecessary to hear argument on this matter, being of opinion that the appeal must fail even if Mr. Heller was negligent. Accordingly I cannot and do not express any opinion on the question whether Mr. Heller was in fact negligent. But I should make it plain that the appellants' complaint is not that Mr. Heller gave his reply without adequate knowledge of the position, nor that he intended to create a false impression, but that what he said was in fact calculated to create a false impression and that he ought to have realised that. and the same applies to the respondents' letter of November 11.

McNair J. gave judgment for the respondents on the ground that they owed no duty of care to the appellants. He said: "I am accordingly driven to the conclusion by authority binding upon me that no such action lies in the absence of contract or fiduciary relationship. On the facts before me there is clearly no contract, nor can I find a fiduciary relationship. It was urged on behalf of the plaintiff that the fact that Easipower Ltd. were heavily indebted to the defendants and that the defendants might benefit from the advertising campaign financed by the plaintiffs, were facts from which a special duty to exercise care might be inferred. In my judgment, however, these facts, though clearly relevant on the question of honesty if this had been in issue, are not sufficient to establish any special relationship involving a duty of care even if it was open to me to extend the sphere of special relationship beyond that of contract and fiduciary relationship."

This judgment was affirmed by the Court of Appeal both because they were bound by authority and because they were not satisfied that it would be reasonable to impose upon a banker the obligation suggested.

Before coming to the main question of law, it may be well to dispose of an argument that there was no sufficiently close relationship between these parties to give rise to any duty. It is said that the respondents did not know the precise purpose of the inquiries and did not even know whether the National Provincial Bank wanted the information for its own use or for the use of a customer: they knew nothing of the appellants. I would reject that argument. They knew that the inquiry was in connection with an advertising contract, and it was at least probable that the information was wanted by the advertising contractors. It seems to me quite immaterial that they did not know who these contractors were: there is no suggestion of any speciality which could have influenced them in deciding whether to give information or in what form to give it. I shall therefore treat this as if it were a case where a negligent misrepresentation is made directly to the person seeking information, opinion or advice, and I shall not attempt to decide what kind or degree of proximity is necessary before there can be a duty owed by the defendant to the plaintiff.

The appellants' first argument was based on *Donoghue v. Stevenson*. That is a very important decision, but I do not think that it has any direct bearing on this case. That decision may encourage us to develop existing lines of authority, but it cannot entitle us to disregard them. Apart altogether from authority, I would think that the law must treat negligent words differently from negligent acts. The law ought so far as possible to reflect the standards of the reasonable man, and that is what *Donoghue v. Stevenson* sets out to do. The most obvious difference between negligent words and negligent acts is this. Quite careful people often express definite opinions on social or informal occasions even when they see that others are likely to be influenced by them; and they often do that without taking that care which they would take if asked for their opinion professionally or in a business connection. The appellant agrees that there can be no duty of care on such occasions, and we were referred to American and South African authorities where that is recognised, although their law appears to have gone much further than ours has yet done. But it is at least unusual casually to put into circulation negligently made articles which are dangerous. A man might give a friend a negligently-prepared bottle of homemade wine and his friend's guests might drink it with dire results. But it is by no means clear that those guests would have no action against the negligent manufacturer.

Another obvious difference is that a negligently made article will only cause one accident, and so it is not very difficult to find the necessary degree of proximity or neighbourhood between the

negligent manufacturer and the person injured. But words can be broadcast with or without the consent or the foresight of the speaker or writer. It would be one thing to say that the speaker owes a duty to a limited class, but it would be going very far to say that he owes a duty to every ultimate "consumer" who acts on those words to his detriment. It would be no use to say that a speaker or writer owes a duty but can disclaim responsibility if he wants to. He, like the manufacturer, could make it part of a contract that he is not to be liable for his negligence: but that contract would not protect him in a question with a third party, at least if the third party was unaware of it.

So it seems to me that there is good sense behind our present law that in general an innocent but negligent misrepresentation gives no cause of action. There must be something more than the mere misstatement. I therefore turn to the authorities to see what more is required. The most natural requirement would be that expressly or by implication from the circumstances the speaker or writer has undertaken some responsibility, and that appears to me not to conflict with any authority which is binding on this House. Where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty. The refusal of English law to recognise any *jus quaesitum tertii* causes some difficulties, but they are not relevant, here. Then there are cases where a person does not merely make a statement but performs a gratuitous service. I do not intend to examine the cases about that, but at least they show that in some cases that person owes a duty of care apart from any contract, and to that extent they pave the way to holding that there can be a duty of care in making a statement of fact or opinion which is independent of contract.

Much of the difficulty in this field has been caused by *Derry v. Peek*. The action was brought against the directors of a company in respect of false statements in a prospectus. It was an action of deceit based on fraud and nothing else. But it was held that the directors had believed that their statements were true although they had no reasonable grounds for their belief. The Court of Appeal held that this amounted to fraud in law, but naturally enough this House held that there can be no fraud without dishonesty and that credulity is not dishonesty. The question was never really considered whether the facts had imposed on the directors a duty to exercise care. It must be implied that on the facts of that case there was no such duty. But that was immediately remedied by the Directors' Liability Act, 1890, which provided that a director is liable for untrue statements in a prospectus unless he proves that he had reasonable ground to believe and did believe that they were true.

It must now be taken that *Derry v. Peek* did not establish any universal rule that in the absence of contract an innocent but negligent misrepresentation cannot give rise to an action. It is true Lord Bramwell said: "To found an action for damages there must be a contract and breach, or fraud." and for the next 20 years it was generally assumed that *Derry v. Peek* decided that. But it was shown in this House in *Nocton v. Lord Ashburton* that that is much too widely stated. We cannot, therefore, now accept as accurate the numerous statements to that effect in cases between 1889 and 1914, and we must now determine the extent of the exceptions to that rule.

In *Nocton v. Lord Ashburton* a solicitor was sued for fraud. Fraud was not proved but he was held liable for negligence. Viscount Haldane L.C. dealt with *Derry v. Peek* and pointed out that while the relationship of the parties in that case was not enough, the case did not decide "that where a different sort of relationship ought to be inferred from the circumstances the case is to be concluded by asking whether an action for deceit will lie ... There are other obligations besides that of honesty the breach of which may give a right to damages. These obligations depend on principles which the judges have worked out in the fashion that is characteristic of a system where much of the law has always been judge-made and unwritten." It hardly needed *Donoghue v. Stevenson* to show that that process can still operate. Then Lord Haldane quoted a passage from the speech of Lord Herschell in *Derry v. Peek* where he excluded from the principle of that case "those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course." Then he explained the expression "constructive fraud" and said: "What it really means in this connection is, not moral fraud in the



ordinary sense, but breach of the sort of obligation which is enforced by a court which from the beginning regarded itself as a court of conscience." He went on to refer to "breach of special duty" and said: "If such a duty can be inferred in a particular case of a person issuing a prospectus, as, for instance, in the case of directors issuing to the shareholders of the company which they direct a prospectus inviting the subscription by them of further capital, I do not find in *Derry v. Peek* an authority for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie." I find no dissent from these views by the other noble and learned Lords. Lord Shaw also quoted the passage I have quoted from the speech of Lord Herschell, and, dealing with equitable relief, he approved a passage in an argument of Sir Roundell Palmer in *Peek v. Gurney* which concluded, "... in order that a person may avail himself of relief founded on it he must show that there was such a proximate relation between himself and the person making the representation as to bring them virtually into the position of parties contracting with each other," an interesting anticipation in 1871 of the test of who is my neighbour.

Lord Haldane gave a further statement of his view in *Robinson v. National Bank of Scotland Ltd.*, a case to which I shall return. Having said that in that case there was no duty excepting the duty of common honesty, he went on to say: "In saying that I wish emphatically to repeat what I said in advising this House in the case of *Nocton v. Lord Ashburton*, that it is great mistake to suppose that, because the principle in *Derry v. Peek* clearly covers all cases of the class to which I have referred, therefore the freedom of action of the courts in recognising special duties arising out of other kinds of relationship which they find established by the evidence is in any way affected. I think, as I said in *Nocton's* case, that an exaggerated view was taken by a good many people of the scope of the decision in *Derry v. Peek*. The whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the courts may find to exist in particular cases, still remains, and I should be very sorry if any word fell from me which should suggest that the courts are in any way hampered in recognising that the duty of care may be established when such cases really occur." This passage makes it clear that Lord Haldane did not think that a duty to take care must be limited to cases of fiduciary relationship in the narrow sense of relationships which had been recognised by the Court of Chancery as being of a fiduciary character. He speaks of other special relationships, and I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him. I say "ought to have known" because in questions of negligence we now apply the objective standard of what the reasonable man would have done.

A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.

If that is right, then it must follow that *Candler v. Crane, Christmas & Co.* was wrongly decided. There the plaintiff wanted to see the accounts of a company before deciding to invest in it. The defendants were the company's accountants, and they were told by the company to complete the company's accounts as soon as possible because they were to be shown to the plaintiff who was a potential investor in the company. At the company's request the defendants showed the completed accounts to the plaintiff, discussed them with him, and allowed him to take a copy. The accounts had been carelessly prepared and gave a wholly misleading picture. It was obvious to the defendants that the plaintiff was relying on their skill and judgment and on their having exercised that care which by contract they owed to the company, and I think that any reasonable man in the plaintiff's shoes would have relied on that. This seems to me to be a typical case of agreeing to

assume a responsibility: they knew why the plaintiff wanted to see the accounts and why their employers, the company, wanted them to be shown to him, and agreed to show them to him without even a suggestion that he should not rely on them.

The majority of the Court of Appeal held that they were bound by *Le Lievre v. Gould* and that *Donoghue v. Stevenson* had no application. In so holding I think that they were right. The Court of Appeal have bound themselves to follow all rationes decidendi of previous Court of Appeal decisions, and, in face of that rule, it would have been very difficult to say that the ratio in *Le Lievre v. Gould* did not cover *Candler's* case. Denning L.J., who dissented, distinguished *Le Lievre v. Gould* on its facts, but, as I understand the rule which the Court of Appeal have adopted, that is not sufficient if the ratio applies; and this is not an appropriate occasion to consider whether the Court of Appeal's rule is a good one. So the question which we now have to consider is whether the ratio in *Le Lievre v. Gould* can be supported. But before leaving *Candler's* case I must note that Cohen L.J. (as he then was) attached considerable importance to a New York decision, *Ultramares Corporation v. Touche*, a decision of Cardozo C.J. But I think that another decision of that great judge, *Glanzer v. Shepherd*, is more in point because in the latter case there was a direct relationship between the weigher who gave a certificate and the purchaser of the goods weighed, who the weigher knew was relying on his certificate: there the weigher was held to owe a duty to the purchaser with whom he had no contract. The *Ultramares* case can be regarded as nearer to *Le Lievre v. Gould*.

In *Le Lievre v. Gould* a surveyor, Gould, gave certificates to a builder who employed him. The plaintiffs were mortgagees of the builder's interest and Gould knew nothing about them or the terms of their mortgage; but the builder, without Gould's authority, chose to show them Gould's report. I have said that I do not intend to decide anything about the degree of proximity necessary to establish a relationship giving rise to a duty of care, but it would seem difficult to find such proximity in this case, and the actual decision in *Le Lievre v. Gould* may therefore be correct. But the decision was not put on that ground: if it had been *Cann v. Willson* would not have been overruled.

Lord Esher M.R. held that there was no contract between the plaintiffs and the defendant and that this House in *Derry v. Peek* had "restated the old law that, in the absence of contract, an action for negligence cannot be maintained when there is no fraud." Bowen L.J. gave a similar reason; he said: Then *Derry v. Peek* decided this further point - viz., that in cases like the present (of which *Derry v. Peek* was itself an instance) there is no duty enforceable in law to be careful"; and he added that the law of England "does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly." So both he and Lord Esher held that *Cann v. Willson* was wrong in deciding that there was a duty to take care. We now know on the authority of *Donoghue v. Stevenson* that Bowen L.J. was wrong in limiting duty of care to guns or other dangerous instruments, and I think that, for reasons which I have already given, he was also wrong in limiting the duty of care with regard to statements to cases where there is a contract. On both points Bowen L.J. was expressing what was then generally believed to be the law, but later statements in this House have gone far to remove those limitations. I would therefore hold that the ratio in *Le Lievre v. Gould* was wrong and that *Cann v. Willson* ought not to have been overruled.

Now I must try to apply these principles to the present case. What the appellants complain of is not negligence in the ordinary sense of carelessness, but rather misjudgment, in that Mr. Heller, while honestly seeking to give a fair assessment, in fact made a statement which gave a false and misleading impression of his customer's credit. It appears that bankers now commonly give references with regard to their customers as part of their business. I do not know how far their customers generally permit them to disclose their affairs, but, even with permission, it cannot always be easy for a banker to reconcile his duty to his customer with his desire to give a fairly balanced reply to an inquiry. and inquirers can hardly expect a full and objective statement of opinion or accurate factual information such as skilled men would be expected to give in reply to

other kinds of inquiry. So it seems to me to be unusually difficult to determine just what duty beyond a duty to be honest a banker would be held to have undertaken if he gave a reply without an adequate disclaimer of responsibility or other warning. It is in light of such considerations that I approach an examination of the case of *Robinson v. National Bank of Scotland Ltd.*

It is not easy to extract the facts from the report of the case in the Court of Session. Several of the witnesses were held to be unreliable and the principal issue in the case, fraud, is not relevant for present purposes. But the position appears to have been this. Harley and two brothers Inglis wished to raise money. They approached an insurance company on the false basis that Harley was to be the borrower and the Inglis brothers were to be guarantors. To satisfy the company as to the financial standing of the Inglis brothers Harley got his London bank to write to M'Arthur, a branch agent of the National Bank of Scotland, and M'Arthur on July 28, 1910, sent a reply which was ultimately held to be culpably careless but not fraudulent. Robinson, the pursuer in the action, said that he had been approached by Harley to become a guarantor before the inquiry was made by Harley, but he was disbelieved by the Lord Ordinary who held that he was not brought into the matter before September. This was accepted by the majority in the Inner House and there is no indication that any of their Lordships in this House questioned the finding that the letter of July 28 was not obtained on behalf of Robinson. Harley and the brothers Inglis did not proceed with their scheme in July but they resumed negotiations in September. The company wanted an additional guarantor and Harley approached Robinson. A further reference was asked and obtained from M'Arthur on October 1 about the Brothers Inglis, but no point was made of this. The whole case turned on M'Arthur's letter of July 28. After further negotiation the company made a loan to Harley with the brothers Inglis and Robinson as guarantors. Harley and the brothers Inglis all became bankrupt and Robinson had to pay the company under his guarantee.

Robinson sued the National Bank and M'Arthur. He alleged that M'Arthur's letter was fraudulent and that he had been induced by it to guarantee the loan. He also alleged that M'Arthur had a duty to disclose certain facts about the brothers Inglis which were known to him, but this alternative case played a very minor part in the litigation. Long opinions were given in the Court of Session on the question of fraud but the alternative case of a duty to disclose was dealt with summarily. The Lord Justice-Clerk said: "It appears to me that there was no such "duty of disclosure imposed upon Mr. M'Arthur towards the pursuer as would justify us in applying the principle on which *Nocton's* case was decided." Lord Dundas referred to cases of liability of a solicitor to his client for erroneous advice and of similar liability arising from a fiduciary relationship and said: "Such decisions seem to me to have no bearing on, or "application to, the facts of the present case." He also drew attention to the last sentence of the letter of July 28 which he said would become important if fraud were out of the case. That sentence is: "The above information is to be considered strictly confidential, and is given on the express understanding that we incur no responsibility whatever in furnishing it." Lord Salvesen, who dissented, did not deal with the point: and Lord Guthrie merely said that here there was no fiduciary relationship.

In this House an unusual course was taken during the argument: "... after counsel for the respondents (Mr. Blackburn K.C.) had been heard for a short time, Earl Loreburn informed him that their Lordships, as at present advised, thought that there was no special duty on M'Arthur toward the pursuer; that the respondents were not liable unless M'Arthur's representations were dishonest; and that their Lordships had not been satisfied as yet that the representations were dishonest "... that under the circumstances the House was prepared to dismiss the appeal; but that they considered the pursuer had been badly treated, though he had not any cause of action at law, and that, therefore, their Lordships were disposed to direct that there should be no costs of the action on either side. Earl Loreburn said that Mr. Blackburn might prefer to argue the case further and endeavour to alter these views, but of course he would run the risk of altering their Lordships' views as to the legal responsibility as well as upon the subject of costs." Mr. Blackburn then - wisely no doubt - said no more, and judgment was given for the bank but with no costs here or below.

That case is very nearly indistinguishable from the present case. Lord Loreburn regarded the fact that M'Arthur knew that his letter might be used to influence others besides the immediate inquirer as entitling Robinson to found on it if fraud had been proved. But it is not clear to me that he intended to decide that there would have been sufficient proximity between Robinson and M'Arthur to enable him to maintain that there was a special relationship involving a duty of care if the other facts had been sufficient to create such a relationship. I would not regard this as a binding decision on that question.

With regard to the bank's duty Lord Haldane said: "There is only one other point about which I wish to say anything, and that is the question which was argued by the appellant, as to there being a special duty of care under the circumstances here. I think the case of *Derry v. Peek* in this House has finally settled in Scotland, as well as in England and Ireland, the conclusion that in a case like this no duty to be careful is established. There is the general duty of common honesty, and that duty, of course, applies to the circumstances of this case as it applies to all other circumstances. But when a mere inquiry is made by one banker of another, who stands in no special relation to him, then, in the absence of special circumstances from which a contract to be careful can be inferred, I think there is no duty excepting the duty of common honesty to which I have referred." I think that by "a contract to be careful" Lord Haldane must have meant an agreement or undertaking to be careful. This was a Scots case and by Scots law there can be a contract without consideration: Lord Haldane cannot have meant that similar cases in Scotland and England would be decided differently on the matter of special relationship for that reason. I am, I think, entitled to note that this was an extempore judgment. So Lord Haldane was contrasting a "mere inquiry" with a case where there are special circumstances from which an undertaking to be careful can be inferred. In *Robinson's* case any such undertaking was excluded by the sentence in M'Arthur's letter which I have quoted and in which he said that the information was given on the express understanding that we incur no responsibility whatever in furnishing it."

It appears to me that the only possible distinction in the present case is that here there was no adequate disclaimer of responsibility. But here the appellants' bank, who were their agents in making the inquiry, began by saying that "they wanted to know in confidence and without responsibility on our part," that is, on the part of the respondents. So I cannot see how the appellants can now be entitled to disregard that and maintain that the respondents did incur a responsibility to them.

The appellants founded on a number of cases in contract where very clear words were required to exclude the duty of care which would otherwise have flowed from the contract. To that argument there are, I think, two answers. In the case of a contract it is necessary to exclude liability for negligence, but in this case the question is whether an undertaking to assume a duty to take care can be inferred: and that is a very different matter. And, secondly, even in cases of contract general words may be sufficient if there was no other kind of liability to be excluded except liability for negligence: the general rule is that a party is not exempted from liability for negligence "unless adequate words are used" - *per* Scrutton L.J. in *Rutter v. Palmer*. It being admitted that there was here a duty to give an honest reply, I do not see what further liability there could be to exclude except liability for negligence: there being no contract there was no question of warranty.

I am therefore of opinion that it is clear that the respondents never undertook any duty to exercise care in giving their replies. The appellants cannot succeed unless there was such a duty and therefore in my judgment this appeal must be dismissed.

#### **LORD MORRIS OF BORTH-Y-GEST**

My Lords, the important question of law which has concerned your Lordships in this appeal is whether, in the circumstances of the case, there was a duty of care owed by the respondents, whom I will call "the bank," to the appellants, whom I will call "Hedleys." In order to recover the damages which they claim Hedleys must establish that the bank owed them a duty, that the bank failed to discharge such duty, and that as a consequence Hedleys suffered loss.

An allegation of fraud was originally made but was abandoned. The learned judge held that the bank had been negligent but that they owed no duty to Hedleys to exercise care. The Court of Appeal agreed with the learned judge that no such duty was owed and it was therefore not necessary for them to consider whether the finding of negligence ought or ought not to be upheld. In your Lordships' House the legal issues were debated and again it did not become necessary to consider whether the finding of negligence ought or ought not to be upheld. It is but fair to the bank to state that they firmly contend that they were not in any way negligent and that they were prepared to make submissions by way of challenge of the conclusions of the learned judge.

[His Lordship stated the facts and continued:] It is, I think, a reasonable and proper inference that the bank must have known that the National Provincial were making their inquiry because some customer of theirs was or might be entering into some advertising contract in respect of which Easipower Ltd. might become under a liability to such customer to the extent of the figures mentioned. The inquiries were from one bank to another. The name of the customer (Hedleys) was not mentioned by the inquiring bank (National Provincial) to the answering bank (the bank): nor did the inquiring bank (National Provincial) give to the customer (Hedleys) the name of the answering bank (the bank). These circumstances do not seem to me to be material. The bank must have known that the inquiry was being made by someone who was contemplating doing business with Easipower Ltd. and that their answer or the substance of it would in fact be passed on to such person. The conditions subject to which the bank gave their answers are important but the fact that the person to whom the answers would in all probability be passed on was unnamed and unknown to the bank is not important for the purposes of a consideration of the legal issue which now arises. It is inherently unlikely that the bank would have entertained of a direct application from Hedleys asking for a report or would have answered an inquiry made by Hedleys themselves: even if they had, they would certainly have stipulated that their answer was without responsibility. The present appeal does not raise any question as to the circumstances under which a banker is entitled (apart from direct authorisation) to answer an inquiry. I leave that question as it was left by Atkin L.J. in *Tournier v. National Provincial & Union Bank of England* when he said: "I do not desire to express any final opinion on the practice of bankers to give one another information as to the affairs of their respective customers, except to say it appears to me that if it is justified it must be upon the basis of an implied consent of the customer."

The legal issue which arises is, therefore, whether the bank would have been under a liability to Hedleys if they had failed to exercise care. This involves the questions whether the circumstances were such that the bank owed a duty of care to Hedleys. or would have owed such a duty but for the words "without responsibility," or whether they owed such a duty but were given a defence by the words "without responsibility" which would protect them if they had failed to exercise due care. My Lords, it seems to me that if A assumes a responsibility to B to tender him deliberate advice, there could be a liability if the advice is negligently given. I say "could be" because the ordinary courtesies and exchanges of life would become impossible if it were sought to attach legal obligation to every kindly and friendly act. But the principle of the matter would not appear to be in doubt. If A employs B (who might, for example, be a professional man such as an accountant or a solicitor or a doctor) for reward to give advice and if the advice is negligently given there could be a liability in B to pay damages. The fact that the advice is given in words would not, in my view, prevent liability from arising. Quite apart, however, from employment or contract there may be circumstances in which a duty to exercise care will arise if a service is voluntarily undertaken. A medical man may unexpectedly come across an unconscious man, who is a complete stranger to him, and who is in urgent need of skilled attention: if the medical man, following the fine traditions of his profession, proceeds to treat the unconscious man he must exercise reasonable skill and care in doing so. In his speech in *Banbury v. Bank of Montreal* Lord Atkinson said: "It is well established that if a doctor proceeded to treat a patient gratuitously, even in a case where the patient was insensible at the time and incapable of employing him, the doctor would be bound to exercise all the professional skill and knowledge he possessed, or professed to possess, and would be guilty of gross negligence if he omitted to do so." To a similar effect were the words of Lord Loughborough in the much earlier case of *Shiells v. Blackburne* when he said: "... if a man

gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence." Compare also *Wilkinson v. Coverdale*. I can see no difference of principle in the case of a banker. If someone who was not a customer of a bank made a formal approach to the bank with a definite request that the bank would give him deliberate advice as to certain financial matters of a nature with which the bank ordinarily dealt the bank would be under no obligation to accede to the request: if, however, they undertook, though gratuitously, to give deliberate advice (I exclude what I might call casual and perfunctory conversations) they would be under a duty to exercise reasonable care in giving it. They would be liable if they were negligent although, there being no consideration, no enforceable contractual relationship was created.

In the absence of any direct dealings between one person and another, there are many and varied situations in which a duty is owed by one person to another. A road user owes a duty of care towards other road users. They are his "neighbours." A duty was owed by the dock owner in *Heaven v. Pender*. Under a contract with a shipowner he had put up a staging outside a ship in his dock. The plaintiff used the staging because he was employed by a ship painter who had contracted with the shipowner to paint the outside of the ship. The presence of the plaintiff was for business in which the dock owner was interested and the plaintiff was to be considered as having been invited by the dock owner to use the staging. The dock owner was therefore under an obligation to take reasonable care that at the time when the staging was provided by him for immediate use it was in a fit state to be used. For an injury which the plaintiff suffered because the staging had been carelessly put up he was entitled to succeed in a claim against the defendant. The chemist in *George v. Skivington* sold the bottle of hair wash to the husband knowing that it was to be used by the wife. It was held on demurrer that the chemist owed a duty towards the wife to use ordinary care in compounding the hair wash. In *Donoghue v. Stevenson* it was held that the manufacturer of an article of food, medicine, or the like, is under a duty to the ultimate consumer to take reasonable care that the article is free from defect likely to cause injury to health.

My Lords, these are but familiar and well known illustrations, which could be multiplied, which show that irrespective of any contractual or fiduciary relationship and irrespective of any direct dealing, a duty may be owed by one person to another. It is said, however, that where careless (but not fraudulent) misstatements are in question there can be no liability in the maker of them unless there is either some contractual or fiduciary relationship with a person adversely affected by the making of them or unless, through the making of them, something is created or circulated or some situation is created which is dangerous to life, limb or property. In logic I can see no essential reason for distinguishing injury which is caused by a reliance upon words from injury which is caused by a reliance upon the safety of the staging to a ship or by a reliance upon the safety for use of the contents of a bottle of hair wash or a bottle of some consumable liquid. It seems to me, therefore, that if A claims that he has suffered injury or loss as a result of acting upon some misstatement made by B who is not in any contractual or fiduciary relationship with him, the inquiry that is first raised is whether B owed any duty to A: if he did the further inquiry is raised as to the nature of the duty. There may be circumstances under which the only duty owed by B to A is the duty of being honest: there may be circumstances under which B owes to A the duty not only of being honest but also a duty of taking reasonable care. The issue in the present case is whether the bank owed any duty to Hedleys and if so what the duty was.

Leaving aside cases where there is some contractual or fiduciary relationship, there may be many situations in which one person voluntarily or gratuitously undertakes to do something for another person and becomes under a duty to exercise reasonable care. I have given illustrations. But apart from cases where there is some direct dealing there may be cases where one person issues a document which should be the result of an exercise of the skill and judgment required by him in his calling and where he knows and intends that its accuracy will be relied upon by another. In this connection it will be helpful to consider the case of *Cann v. Willson*. The owner of some property wished to obtain an advance of money on mortgage of the property and applied to a firm of solicitors for the purpose of their finding a mortgagee. Being informed by the solicitors that, for the purpose of finding a mortgagee, he should have a valuation made of the property, he consulted the

defendants and asked them to make a valuation. They surveyed and inspected the property and then made a valuation which they sent to the solicitors. The solicitors then particularly called the defendants' attention to the purpose for which the valuation was wanted and to the responsibility they were undertaking. The defendants stated that their valuation was a moderate one and certainly was not made in favour of the borrower. The valuation and representations so made by the defendants to the solicitors were communicated to the plaintiff (and a co-trustee of his) by the solicitors. The plaintiff (and his co-trustee, who died before the commencement of the action) then advanced money to the owner upon the security of a mortgage of his property. Chitty J. held on the evidence (1) that the defendants were aware of the purpose for which the valuation was made, and (2) that the "valuation was sent by the defendants direct to the agents of the plaintiff for the purpose of inducing the plaintiff and his co-trustee to lay out the trust money on mortgage." The owner made default in payment and the property proved insufficient to answer the mortgage. The plaintiff alleged that the value of the property was not anything like the value given by the defendants in their valuation. Chitty J. held that "the valuation as made was, in fact, no valuation at all." In those circumstances, the claim made was on the basis that the plaintiff had sustained loss through the negligence, want of skill, breach of duty and misrepresentation of the defendants. Chitty J. held the defendants liable. His decision was principally based upon his finding that the defendants owed a duty of care to the plaintiff. It had been argued that there was also liability in the defendants in contract (referred to in the judgment as the first ground) and on the ground of fraud (referred to as the third ground). At the end of his judgment Chitty J. said: "I have entirely passed by the question of contract. It is unnecessary to decide that point. I consider on these two last grounds - and if I were to prefer one to the other it would be the ground - that, the defendant, is liable for the negligence." In the course of his judgment he said: "It is not necessary, in my opinion, to decide the case with reference to the third point, but even on the third point I think the defendants are liable - and that is what may be termed fraudulent misrepresentation." He then (that is, on June 7, 1888) referred to the judgment in the Court of Appeal in *Peek v. Derry*. That judgment was reversed in the House of Lords on July 1, 1889. Chitty J. compared the situation with that which arose in *Heaven v. Pender*. He pointed out that in that case there was "no contractual relation between the plaintiff and the dock-owner, and there was no personal direct invitation to the plaintiff to come and do the work on that ship, yet it was held that the dock-owner had undertaken an obligation towards the plaintiff, who was one of the persons likely to come and do the work to the vessel, and that he was liable to him and was under an obligation to him to use due diligence in the construction of the staging." Chitty J. went on, therefore, to hold that, as the defendants had "knowingly placed themselves" in the position of sending their valuation "direct to the agents of the plaintiff for the purpose of inducing the plaintiff," then they "in point of law incurred a duty towards him to use reasonable care in the preparation of the document." He likened the case to *George v. Skivington* and continued: In this case the document supplied appears to me to stand upon a similar footing and not to be distinguished from that case, as if it had been an actual article that had been handed over for the particular purpose of being so used. I think, therefore, that the defendants stood with regard to the plaintiff - quite apart from any question of there being a contract or not in the peculiar circumstances of this case - in the position of being under an obligation or duty towards him." My Lords, I can see no fault or flaw in this reasoning and I am prepared to uphold it. If it is correct, then it is submitted that in the present case the bank knew that some existing (though to them by name unknown) person was going to place reliance upon what they said and that accordingly they owed a duty of care to such person. I will examine this submission. Before doing so I must, however, further consider *Cann v. Willson*. It was overruled by the Court of Appeal in *Le Lievre v. Gould*. The latter case, binding on the Court of Appeal, in turn led to the decision in *Candler v. Crane, Christmas & Co*. It is necessary, therefore, to consider the reasons which governed the Court of Appeal in *Le Lievre v. Gould* in overruling *Cann v. Willson*. I do not propose to examine the facts in *Le Lievre v. Gould*; nor need I consider whether the result would have been no different had *Cann v. Willson* not been overruled. Lord Esher M.R. said: "But I do not hesitate to say that *Cann v. Willson* is not now law. Chitty J., in deciding that case, acted upon an erroneous proposition of law, which has been since overruled by the House of Lords in *Derry v. Peek* when they restated the old law that, in the absence of contract, an action for negligence cannot be maintained when there is no fraud." Bowen L.J. said that he considered that *Derry v. Peek* had overruled *Cann v. Willson*. He considered that *Heaven v. Pender* gave no

support for that decision because it was no more than an instance of the class of cases where one who, having the conduct and control of premises which may injure those whom he knows will have a right to and will use them, owes a duty to protect them. He said: "Then *Derry v. Peek* decided this further point, - viz., that in cases like the present (of which *Derry v. Peek* was itself an instance) there is no duty enforceable in law to be careful." He followed the view expressed by Romer J. in *Scholes v. Brook* that the decision of the House of Lords in *Derry v. Peek* by implication negated the existence of any such general rule as laid down in *Cann v. Willson*. The reasoning of A. L. Smith L.J. in overruling *Cann v. Willson* was on similar lines.

The inquiry is thus raised as to whether it was correct to say that *Derry v. Peek* had either directly or at least by implication overruled that part of the reasoning in *Cann v. Willson* which led Chitty J. to say that, quite apart from contract and quite apart from fraud, there was a duty of care owed by the defendants to the plaintiffs. My Lords, whatever views may have been held at one time as to the effect of *Derry v. Peek*, authoritative guidance as to this matter was given in your Lordships' House in 1914 in the case of *Nocton v. Lord Ashburton*. In his speech in that case Viscount Haldane L.C. said: "My Lords, the discussion of the case by the noble and learned Lords who took part in the decision appears to me to exclude the hypothesis that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit. They must indeed be taken to have thought that the facts proved as to the relationship of the parties in *Derry v. Peek* were not enough to establish any special duty arising out of that relationship other than the general duty of honesty. But they do not say that where a different sort of relationship ought to be inferred from the circumstances the case is to be concluded by asking whether an action for deceit will lie. I think that the authorities subsequent to the decision of the House of Lords show a tendency to assume that it was intended to mean more than it did. In reality the judgment covered only a part of the field in which liabilities may arise. There are other obligations besides that of honesty the breach of which may give a right to damages. These obligations depend on principles which the judges have worked out in the fashion that is characteristic of a system where much of the law has always been judge-made and unwritten." After a review of many authorities Lord Haldane said: "But side by side with the enforcement of the duty of universal obligation to be honest and the principle which gave the right to rescission, the courts, and especially the Court of Chancery, had to deal with the other cases to which I have referred, cases raising claims of an essentially different character, which have often been mistaken for actions of deceit. Such claims raise the question whether the circumstances and relations of the parties are such as to give rise to duties of particular obligation which have not been fulfilled." Lord Haldane pointed out that from the circumstances and relations of the parties a special duty may arise: there may be an implied contract at law or a fiduciary obligation in equity. What *Derry v. Peek* decided was that the directors were under no fiduciary duty to the public to whom they had addressed the invitation to subscribe. (I need not here refer to statutory enactments since *Derry v. Peek*.)

In his speech in the same case Lord Dunedin pointed out that there can be no negligence unless there is a duty but that a duty may arise in many ways. There may be duties owing to the world at large: *alterum non laedere*. There may be duties arising from contract. There may be duties which arise from a relationship without the intervention of contract in the ordinary sense of the term, such as the duties of a trustee to his cestui que trust or of a guardian to his ward.

Lord Shaw in his speech pointed out that *Derry v. Peek* "was an action wholly and solely of deceit, founded wholly and solely on fraud, was treated by this House on that footing alone, and that - this being so - what was decided was that fraud must *ex necessitate* contain the element of moral delinquency. Certain expressions by learned Lords may seem to have made incursions into the region of negligence, but *Derry v. Peek* as a decision was directed to the single and specific point just set out." Lord Shaw formulated the following principle: That once the relations of parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the



adviser or informer, although the information and advice have been given not fraudulently but in good faith."

Lord Parmoor in his speech said in reference to *Derry v. Peek*: "That case decides that in an action founded on deceit, and in which deceit is a necessary factor, actual dishonesty, involving mens rea, must be proved. The case, in my opinion, has no bearing whatever on actions founded on a breach of duty in which dishonesty is not a necessary factor."

My Lords, guided by the assistance given in *Nocton v. Lord Ashburton*, I consider that it ought not to have been held in *Le Lievre v. Gould* that *Cann v. Willson* was wrongly decided. Independently of contract, there may be circumstances where information is given or where advice is given which establishes a relationship which creates a duty not only to be honest but also to be careful.

In his speech in *Heilbut, Symons & Co. v. Buckleton* Lord Moulton said that it was of the greatest importance to "maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made." That principle is, however, in no way impeached by recognition of the fact that if a duty exists there is a remedy for the breach of it. As Bowen L.J. said in *Low v. Bouverie*: "... the doctrine that negligent misrepresentation affords no cause of action is confined to cases in which there is no duty, such as the law recognises, to be careful."

The inquiry in the present case, and in similar cases, becomes, therefore, an inquiry as to whether there was a relationship between the parties which created a duty and, if so, whether such duty included a duty of care.

The guidance which Lord Haldane gave in *Nocton v. Lord Ashburton* was repeated by him in his speech in *Robinson v. National Bank of Scotland Ltd.* He clearly pointed out that *Derry v. Peek* did not affect (1) the whole doctrine as to fiduciary relationship, (2) the duty of care arising from implied as well as express contracts, and (3) the duty of care arising from other special relationships which the courts may find to exist in particular cases.

My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

I do not propose to examine the facts of particular situations or the facts of recently decided cases in the light of this analysis but I proceed to apply it to the facts of the case now under review. As I have stated, I approach the case on the footing that the bank knew that what they said would in fact be passed on to some unnamed person who was a customer of the National Provincial Bank. The fact that it was said that "they," that is, the National Provincial Bank, "wanted to know" does not prevent this conclusion. In these circumstances, I think some duty towards the unnamed person, whoever it was, was owed by the bank. There was a duty of honesty. The great question, however, is whether there was a duty of care. The bank need not have answered the inquiry from the National Provincial Bank. It appears, however, that it is a matter of banking convenience or courtesy and presumably of mutual business advantage that inquiries as between banks will be answered. The fact that it is most unlikely that the bank would have answered a direct inquiry from Hedleys does not affect the question as to what the bank must have known as to the use that would be made of any answer that they gave but it cannot be left out of account in considering what it was that the bank undertook to do. It does not seem to me that they undertook before answering an inquiry to expend time or trouble "in searching records, studying documents, weighing and comparing the favourable and unfavourable features and producing a well-balanced

and well-worded report." (I quote the words of Pearson L.J. Nor does it seem to me that the inquiring bank (nor therefore their customer) would expect such a process. This was, I think, what was denoted by Lord Haldane in his speech in *Robinson v. National Bank of Scotland Ltd.* when he spoke of a "mere inquiry" being made by one banker of another. In *Parsons v. Barclay & Co. Ltd.* Cozens-Hardy M.R. expressed the view that it was no part of a banker's duty, when asked for a reference, to make inquiries outside as to the solvency or otherwise of the person asked about or to do more than answer the question put to him honestly from what he knew from the books and accounts before him. There was in the present case no contemplation of receiving anything like a formal and detailed report such as might be given by some concern charged with the duty (probably for reward) of making all proper and relevant inquiries concerning the nature, scope and extent of a company's activities and of obtaining and marshalling all available evidence as to its credit, efficiency, standing and business reputation. There is much to be said, therefore, for the view that if a banker gives a reference in the form of a brief expression of opinion in regard to credit-worthiness he does not accept, and there is not expected from him, any higher duty than that of giving an honest answer. I need not, however, seek to deal further with this aspect of the matter, which perhaps cannot be covered by any statement of general application, because, in my judgment, the bank in the present case, by the words which they employed, effectively disclaimed any assumption of a duty of care. They stated that they only responded to the inquiry on the basis that their reply was without responsibility. If the inquirers chose to receive and act upon the reply they cannot disregard the definite terms upon which it was given. They cannot accept a reply given with a stipulation and then reject the stipulation. Furthermore, within accepted principles (as illustrated in *Rutter v. Palmer* the words employed were apt to exclude any liability for negligence.

I would therefore dismiss the appeal.

#### **LORD HODSON**

My Lords, the appellants, who are advertising agents, claim damages for loss which they allege they have suffered through the negligence of the respondents, who are merchant bankers. The negligence attributed to the respondents consists of their failure to act with reasonable skill and care in giving references as to the credit-worthiness of a company called Easipower Ltd. which went into liquidation after the references had been given so that the appellants were unable to recover the bulk of the costs of advertising orders which Easipower Ltd. had placed with them. The learned judge at the trial found that the respondent bankers had been negligent in the advice which they gave in the form of bankers' references, the appellants being a company which acted in reliance on the references and suffered financial loss accordingly, but that he must enter judgment for the respondents since there was no duty imposed by law to exercise care in giving these references, the duty being only to act honestly in so doing.

The respondents have at all times maintained that they were in no sense negligent and further that no damage flowed from the giving of references, but first they took the point that, whether or no they were careless and whether or no the appellants suffered damage as a result of their carelessness, they must succeed on the footing that no duty was owed by them. This point has been taken throughout as being, if the respondents are right, decisive of the whole matter. I will deal with it first, although the underlying question is whether the respondent bankers who at all times disclaimed responsibility ever assumed any duty at all.

The appellants depend on the existence of a duty said to be assumed by or imposed on the respondents when they gave a reference as to the credit-worthiness of Easipower Ltd. knowing that it would or might be relied upon by the appellants or some other third party in like situation. The case has been argued first on the footing that the duty was imposed by the relationship between the parties recognised by law as being a special relationship derived either from the notion of proximity introduced by Lord Esher in *Heaven v. Pender*, or from those cases firmly established in our law which show that those who hold themselves out as possessing a special skill are under a duty to exercise it with reasonable care.

The important case of *Donoghue v. Stevenson* shows that the area of negligence is extensive, for, as Lord Macmillan said: "The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. ... Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken."

In that case the necessary relationship was held to have been established where the manufacturer of an article, ginger beer in a bottle, sold it to a distributor in circumstances which prevented the distributor or the ultimate purchaser or consumer from discovering by inspection any defect. He is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from injurious defect. No doubt that was the actual decision in that case, and indeed it was thought by Wrottesley J. in *Old Gate Estates Ltd. v. Toplis & Harding & Russell* that he was precluded from awarding damages in tort for a negligent valuation made by a firm of valuers which knew it was to be used by the plaintiffs since the doctrine of *Donoghue v. Stevenson* was confined to negligence which results in danger to life, limb or health. I do not think that this is the true view of *Donoghue v. Stevenson*, but the decision itself, although its effect has been extended to cases where there was no expectation as contrasted with opportunity of inspection (see *Grant v. Australian Knitting Mills Ltd.* and to liability of repairers (see *Haseldine v. C. A. Daw & Son Ltd.*, has never been applied to cases where damages are claimed in tort for negligent statements producing damage. The attempt so to apply it failed as recently as 1951, when in *Candler v. Crane, Christmas & Co.* the Court of Appeal by a majority held that a false statement made carelessly, as contrasted with fraudulently, by one person to another, though acted on by that other to his detriment, was not actionable in the absence of any contractual or fiduciary relationship between the parties and that this principle had in no way been modified by the decision in *Donoghue v. Stevenson*. Cohen L.J., one of the majority of the court, referred to the language of Lord Esher M.R. in *Le Lievre v. Gould*, who, repeating the substance of what he had said in *Heaven v. Pender*, said: "If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." Asquith L.J., the other member of the majority of the court, held that the "neighbour" doctrine had not been applied where the damage complained of was not physical in its incidence to either person or property. The majority thus went no further than Wrottesley J., in the *Old Gate Estates* case save that injury to property was said to be contemplated by the doctrine expounded in *Donoghue v. Stevenson*. It is desirable to consider the reasons given by the majority for their decision in the *Candler* case, for the appellants rely upon the dissenting judgment of Denning L.J. in the same case. The majority, as also the learned trial judge, held that they were bound by the decision of the Court of Appeal in *Le Lievre v. Gould*, in which the leading judgment was given by Lord Esher M.R. and referred to as authoritative by Lord Atkin in *Donoghue v. Stevenson*.

It is true that Lord Esher refused to extend the proximity doctrine so as to cover the relationship between the parties in that case and the majority in *Candler's* case were unable to draw a valid distinction between the facts of that case and the case of *Le Lievre v. Gould*. Denning L.J., however, accepted the argument for the appellant which has been repeated before your Lordships, that the facts in *Le Lievre v. Gould* were not such as to impose a liability, for the plaintiff mortgagees who alleged that the owner's surveyor owed a duty to them not only had the opportunity but had stipulated for inspection by their own surveyor. The defendant's employee who prepared the accounts in *Candler's* case knew that the plaintiff was a potential investor in the company of which the accounts were negligently prepared and that the accounts were required in order that they might be shown to the plaintiff. In these circumstances I agree with Denning L.J. that there is a valid distinction between the two cases. In *Le Lievre v. Gould* it was held that an older case of *Cann v. Willson* was overruled. That is a case where the facts were in *pari materia* with those in *Candler's* case and Chitty J. held the defendants liable because (1) they independently of contract owed a duty to the plaintiff which they failed to discharge, (2) that they had made reckless statements on which the plaintiff had acted. This case was decided before this

House, in *Derry v. Peek*, overruled the Court of Appeal on the second proposition but the first proposition was untouched by *Derry v. Peek*, and, in so far as it depended on the authority of *George v. Skivington*, the latter case was expressly affirmed in *Donoghue v. Stevenson* although it had often previously been impugned. It is true that, as Asquith L.J. pointed out in referring to *George v. Skivington*, the hair wash, put into circulation with the knowledge that it was intended to be used by the purchaser's wife, was a negligently compounded hair wash so that the case was so far on all fours with *Donoghue v. Stevenson*, but the declaration also averred that the defendant had said that the hair wash was safe. I cannot see that there is any valid distinction in this field between a negligent statement, for example, an incorrect label on a bottle which leads to injury and a negligent compounding of ingredients which leads to the same result. It may well be that at the time when *Le Lievre v. Gould* was decided the decision of this House in *Derry v. Peek* was thought to go further than it did. It certainly decided that careless statements recklessly but honestly made by directors in a prospectus issued to the public were not actionable on the basis of fraud, and inferentially that such statements would not be actionable in negligence (which had not in fact been pleaded), but it was pointed out by this House in *Nocton v. Lord Ashburton* that an action does lie for negligent misstatement where the circumstances disclose a duty to be careful. It is necessary in this connection to quote the actual language of Lord Haldane: "Such a special duty may arise from the circumstances and relations of the parties. These may give rise to an implied contract at law or to a fiduciary obligation in equity. If such a duty can be inferred in a particular case of a person issuing a prospectus, as, for instance, in the case of directors issuing to the shareholders of the company which they direct a prospectus inviting the subscription by them of further capital, I do not find in *Derry v. Peek* an authority for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie. What was decided there was that from the facts proved in that case no such special duty to be careful in statement could be inferred, and that mere want of care therefore gave rise to no cause of action. In other words, it was decided that the directors stood in no fiduciary relation and therefore were under no fiduciary duty to the public to whom they had addressed the invitation to subscribe. I have only to add that the special relationship must, whenever it is alleged, be clearly shown to exist."

So far I have done no more than summarise the argument addressed to the Court of Appeal in *Candler's* case to which effect was given in the dissenting judgment of Denning L.J., with which I respectfully agree in so far as it dealt with the facts of that case. I am therefore of opinion that his judgment is to be preferred to that of the majority, although the opinion of the majority is undoubtedly supported by the ratio decidendi of *Le Lievre v. Gould* which they cannot be criticised for following.

This, however, does not carry the appellants further than this, that, provided they can establish a special duty, they are entitled to succeed in an action based on breach of that duty.

I shall later refer to certain cases which support the view that, apart from what are usually called fiduciary relationships such as those between trustee and cestui que trust, solicitor and client, parent and child, or guardian and ward, there are other circumstances in which the law imposes a duty to be careful, which is not limited to a duty to be careful to avoid personal injury or injury to property but covers a duty to avoid inflicting pecuniary loss provided always that there is a sufficiently close relationship to give rise to a duty of care.

The courts of equity recognised that a fiduciary relationship exists "in almost every shape," to quote from Field J. in *Plowright v. Lambert*. He went on to refer to a case (*Tate v. Williamson* which had said that the relationship could be created "voluntarily, as it were, by a person coming into a state of confidential relationship with another by offering to give advice in a matter, and so being disabled thereafter from purchasing."

It is difficult to see why liability as such should depend on the nature of the damage. Lord Roche in *Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners)* instanced damage to a lorry by the negligence of the driver of another lorry which, while it does no damage to the goods in the

second lorry, causes the goods owner to be put to expense which is recoverable by direct action against the negligent driver.

It is not to be supposed that the majority of the Court of Appeal who decided as they did in *Candler's* case were unmindful of the decision in *Nocton v. Lord Ashburton*, to which their attention was drawn, but they seem to have been impressed with the view that in the passage I have quoted Lord Haldane had in mind only fiduciary relationships in the strict sense, but, in my opinion, the words need not be so limited. I am fortified in this opinion by examples to be found in the old authorities such as *Shiells v. Blackburne*, *Wilkinson v. Coverdale* and *Gladwell v. Steggall*, which are illustrations of cases where the law has held that a duty to exercise reasonable care (breach of which is remediable in damages) has been imposed in the absence of a fiduciary relationship where persons hold themselves out as possessing special skill and are thus under a duty to exercise it with reasonable care. The statement of Lord Loughborough in *Shiells v. Blackburne* is always accepted as authoritative and ought not to be dismissed as dictum, although the plaintiff failed to establish facts which satisfied the standard he set. He said: "... if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence." True that proximity is more difficult to establish where words are concerned than in the case of other activities and mere casual observations are not to be relied upon (see *Fish v. Kelly*, but these matters go to difficulty of proof rather than principle.

A modern instance is to be found in the case of *Woods v. Martins Bank Ltd.*, where Salmon J. held that on the facts of the case the defendant bank which had held itself out as being advisers on investments (which was within the scope of their business) and had not given the plaintiff reasonably careful or skilful advice so that he suffered loss were held in breach of duty and so liable in damages even though the plaintiff may not have been a customer of the bank at the material time.

True that the learned judge based this part of his conclusion on a fiduciary relationship which he held to exist between the plaintiff and the bank and thus brought himself within the scope of the decision in *Candler's* case by which he was bound. For my part, I should have thought that even if the learned judge put a strained interpretation on the word "fiduciary" which is based on the idea of trust, the decision can be properly sustained as an example involving a special relationship.

I do not overlook the point forcefully made by Harman L.J. in his judgment and elaborated by counsel for the respondents before your Lordships, that it may in certain cases appear to be strange that, whereas innocent misrepresentation does not sound in damages, yet in the special cases under consideration an injured party may sue in tort a third party whose negligent misrepresentation has induced him to enter into the contract. As was pointed out by Lord Wrenbury, however, in *Banbury v. Bank of Montreal*, innocent misrepresentation is not the cause of action but evidence of the negligence which is the cause of action.

Was there, then, a special relationship here? I cannot exclude from consideration the actual terms in which the reference was given and I cannot see how the appellants can get over the difficulty which these words put in their way. They cannot say that the respondents are seeking, as it were, to contract out of their duty by the use of language which is insufficient for the purpose, if the truth of the matter is that the respondents never assumed a duty of care nor was such a duty imposed upon them.

The first question is whether a duty was ever imposed, and the language used must be considered before the question can be answered. In the case of a person giving a reference I see no objection in law or morals to the giver of the reference protecting himself by giving it without taking responsibility for anything more than the honesty of his opinion - which must involve without taking responsibility for negligence in giving that opinion. I cannot accept the contention of the appellants that the responsibility disclaimed was limited to the bank to which the reference was given, nor can I agree that it referred only to responsibility for accuracy of detail.

Similar words were present in the case of *Robinson v. National Bank of Scotland Ltd.*, a case in which the facts cannot, I think, be distinguished in any material respect from this. Moreover, in the Inner House the words of disclaimer were, I think, treated as not without significance.

In this House the opinion was clearly expressed that the representations made were careless, inaccurate and misleading but that the pursuer had no remedy since there was no special duty on the bank's representative towards the pursuer. This conclusion was reached quite apart from the disclaimer of responsibility contained in the defender bank's letters.

Viscount Haldane recalled the case of *Nocton v. Lord Ashburton* in the following passage: "In saying that I wish emphatically to repeat what I said in advising this House in the case of *Nocton v. Lord Ashburton*, that it is a great mistake to suppose that, because the principle in *Derry v. Peek* clearly covers all cases of the class to which I have referred, therefore the freedom of action of the courts in recognising special duties arising out of other kinds of relationship which they find established by the evidence is in any way affected. I think, as I said in *Nocton's* case, that an exaggerated view was taken by a good many people of the scope of the decision in *Derry v. Peek*. The whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the courts may find to exist in particular cases, still remains, and I should be very sorry if any word fell from me which should suggest that the courts are in any way hampered in recognising that the duty of care may be established when such cases really occur."

This authority is, I think, conclusive against the appellants and is not effectively weakened by the fact that the case came to an end before that matter had been fully argued upon the House intimating that it was prepared to dismiss the appeal without costs on either side since the pursuer had, in its opinion, been badly treated. Since no detailed reasons were given by the House for the view that a banker's reference given honestly does not in the ordinary course carry with it a duty to take reasonable care, that duty being based on a special relationship, it will not, I hope, be out of place if I express my concurrence with the observations of Pearson L.J. who delivered the leading judgment in the Court of Appeal and said: "Apart from authority, I am not satisfied that it would be reasonable to impose upon a banker the obligation suggested, if that obligation really adds anything to the duty of giving an honest answer. It is conceded by Mr. Cooke that the banker is not expected to make outside inquiries to supplement the information which he already has. Is he then expected, in business hours in the bank's time, to expend time and trouble in searching records, studying documents, weighing and comparing the favourable and unfavourable features and producing a well-balanced and well-worded report? That seems wholly unreasonable. Then, if he is not expected to do any of those things, and if he is permitted to give an impromptu answer in the words that immediately come to his mind on the basis of the facts which he happens to remember or is able to ascertain from a quick glance at the file or one of the files, the duty of care seems to add little, if anything, to the duty of honesty. If the answer given is seriously wrong, that is some evidence - of course, only some evidence - of dishonesty. Therefore, apart from authority, it is far from clear, to my mind, that the banker, in answering such an inquiry, could reasonably be supposed to be assuming any duty higher than that of giving an honest answer."

This is to the same effect as the opinion of Cozens Hardy M.R. in *Parsons v. Barclay & Co. Ltd.*: "I desire for myself to repudiate entirely the suggestion that when one banker is asked by another for a customer such a question as was asked here, it is in any way the duty of the banker to make inquiries other than what appears from the books of account before him, or, of course, to give information other than what he is acquainted with from his own personal knowledge ... I think that if we were to take the contrary view ... we should necessarily be putting a stop to that very wholesome and useful habit by which the banker answers in confidence and answers honestly, to another banker."

It would, I think, be unreasonable to impose an additional burden on persons such as bankers who are asked to give references and might, if more than honesty were required, be put to great trouble before all available material had been explored and considered.

It was held in *Low v. Bouverie* that if a trustee takes upon himself to answer the inquiries of a stranger about to deal with the cestui que trust, he is not under a legal obligation to do more than to give honest answers to the best of his actual knowledge and belief, he is not bound to make inquiries himself. I do not think a banker giving references in the ordinary exercise of business should be in any worse position than the trustee. I have already pointed out that a banker, like anyone else, may find himself involved in a special relationship involving liability, as in *Woods v. Martins Bank Ltd.*, but there are no special features here which enable the appellants to succeed.

I do not think it is possible to catalogue the special features which must be found to exist before the duty of care will arise in a given case, but since preparing this opinion I have had the opportunity of reading the speech which my noble and learned friend, Lord Morris of Borth-y-Gest, has prepared. I agree with him that if in a sphere where a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry such person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows, or should know, will place reliance upon it, then a duty of care will arise.

I would dismiss the appeal.

## **LORD DEVLIN**

My Lords, the bare facts of this case, stated sufficiently to raise the general point of law, are these. The appellants, being anxious to know whether they could safely extend credit to certain traders with whom they were dealing, sought a banker's reference about them. For this purpose their bank, the National Provincial, approached the respondents who are the traders' bank. The respondents gave, without making any charge for it and in the usual way, a reference which was so carelessly phrased that it led the appellants to believe the traders to be creditworthy when in fact they were not. The appellants seek to recover from the respondents the consequent loss.

Mr. Foster, for the respondents, has given your Lordships three reasons why the appellants should not recover. The first is founded upon a general statement of the law which, if true, is of immense effect. Its hypothesis is that there is no general duty not to make careless statements. No one challenges that hypothesis. There is no duty to be careful in speech as there is a duty to be honest in speech. Nor indeed is there any general duty to be careful in action. The duty is limited to those who can establish some relationship of proximity such as was found to exist in *Donoghue v. Stevenson*. A plaintiff cannot, therefore, recover for financial loss caused by a careless statement unless he can show that the maker of the statement was under a special duty to him to be careful. Mr. Foster submits that this special duty must be brought under one of three categories. It must be contractual; or it must be fiduciary; or it must arise from the relationship of proximity and the financial loss must flow from physical damage done to the person or the property of the plaintiff. The law is now settled, Mr. Foster submits, and these three categories are exhaustive. It was so decided in *Candler v. Crane, Christmas & Co.* and that decision, Mr. Foster submits, is right in principle and in accordance with earlier authorities.

Mr. Gardiner, for the appellants, agrees that outside contractual and fiduciary duty there must be a relationship of proximity - that is *Donoghue v. Stevenson* - but he disputes that recovery is then limited to loss flowing from physical damage. He has not been able to cite a single case in which a defendant has been held liable for a careless statement leading, otherwise than through the channel of physical damage, to financial loss. But he submits that in principle such loss ought to be recoverable and that there is no authority which prevents your Lordships from acting upon that principle. Unless Mr. Gardiner can persuade your Lordships of this, his case fails at the outset.

This, therefore, is the first and the most fundamental of the issues which the House is asked to decide.

Mr. Foster's second reason is that, if it is open to your Lordships to declare that there are or can be special or proximate relationships outside the categories he has named, your Lordships cannot formulate one to fit the case of a banker who gives a reference to a third party who is not his customer; and he contends that your Lordships have already decided that point in *Robinson v. National Bank of Scotland Ltd.* His third reason is that if there can be found in cases such as this a special relationship between bankers and third parties, on the facts of the present case the appellants fall outside it; and here he relies particularly on the fact that the reference was marked Strictly confidential and given on the express understanding that we incur no responsibility whatever in furnishing it."

My Lords, I approach the consideration of the first and fundamental question in the way in which Lord Atkin approached the same sort of question - that is, in essence the same sort, though in particulars very different - in *Donoghue v. Stevenson*. If Mr. Foster's proposition is the result of the authorities, then, as Lord Atkin said, "I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House." So before I examine the authorities, I shall explain why I think that the law, if settled as Mr. Foster says it is, would be defective. As well as being defective in the sense that it would leave a man without a remedy where he ought to have one and where it is well within the scope of the law to give him one, it would also be profoundly illogical. The common law is tolerant of much illogicality, especially on the surface; but no system of law can be workable if it has not got logic at the root of it.

Originally it was thought that the tort of negligence must be confined entirely to deeds and could not extend to words. That was supposed to have been decided by *Derry v. Peek*. I cannot imagine that anyone would now dispute that if this were the law, the law would be gravely defective. The practical proof of this is that the supposed deficiency was in relation to the facts in *Derry v. Peek* immediately made good by Act of Parliament. Today it is unthinkable that the law could permit directors to be as careless as they liked in the statements they made in a prospectus.

A simple distinction between negligence in word and negligence in deed might leave the law defective but at least it would be intelligible. This is not, however, the distinction that is drawn in Mr. Foster's argument and it is one which would be unworkable. A defendant who is given a car to overhaul and repair if necessary is liable to the injured driver (a) if he overhauls it and repairs it negligently and tells the driver it is safe when it is not; (b) if he overhauls it and negligently finds it not to be in need of repair and tells the driver it is safe when it is not; and (c) if he negligently omits to overhaul it at all and tells the driver that it is safe when it is not. It would be absurd in any of these cases to argue that the proximate cause of the driver's injury was not what the defendant did or failed to do but his negligent statement on the faith of which the driver drove the car and for which he could not recover. In this type of case, where if there were a contract there would undoubtedly be a duty of service, it is not practicable to distinguish between the inspection or examination, the acts done or omitted to be done, and the advice or information given. So neither in this case nor in *Candler v. Crane, Christmas & Co.* (Denning L.J. noted the point where he gave the example of the analyst who negligently certifies food to be harmless) has Mr. Foster argued that, the distinction lies there.

This is why the distinction is now said to depend on whether financial loss is caused through physical injury or whether it is caused directly. The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense in this. If irrespective of contract, a doctor negligently advises a patient that he can safely pursue his occupation and he cannot and the patient's health suffers and he loses his livelihood, the patient has a remedy. But if the doctor negligently advises him that he cannot safely pursue his occupation when in fact he can and he loses his livelihood, there is said to be no remedy. Unless, of course, the patient was a private patient and the doctor accepted half a guinea for his trouble: then the patient can recover



all. I am bound to say, my Lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of the need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense. The line is not drawn on any intelligible principle. It just happens to be the line which those who have been driven from the extreme assertion that negligent statements in the absence of contractual or fiduciary duty give no cause of action have in the course of their retreat so far reached.

I shall now examine the relevant authorities, and your Lordships will, I hope pardon me if with one exception I attend only to those that have been decided in this House, for I have made it plain that I will not in this matter yield to persuasion but only to compulsion. The exception is the case of *Le Lievre v. Gould*, for your Lordships will not easily upset decisions of the Court of Appeal if they have stood unquestioned for as long as 70 years. The five relevant decisions of this House are *Derry v. Peek*, *Nocton v. Lord Ashburton*, *Robinson v. National Bank of Scotland Ltd.*, *Donoghue v. Stevenson*, and *The Greystoke Castle*. The last of these I can deal with at once, for it lies outside the main stream of authority on this point. It is a case in which damage was done to a ship as the result of a collision with another ship. The owners of cargo on the first ship, which cargo was not itself damaged, thus became liable to the owners of the first ship for a general average contribution. They sued the second ship as being partly to blame for the collision. Thus they were claiming for the financial loss caused to them by having to make the general average contribution although their property sustained no physical damage. This House held that they could recover. Their Lordships did not in that case lay down any general principle about liability for financial loss in the absence of physical damage; but the case itself makes it impossible to argue that there is any general rule showing that such loss is of its nature irrecoverable.

I turn back to the earlier authorities beginning with *Derry v. Peek*. The facts in this case are so well known that I need not state them again. Nor need I state in my own words the effect of the decision. That has been done authoritatively by this House in *Nocton v. Lord Ashburton*. I quote Lord Haldane as stating most comprehensively the limits of the decision, noting that his view of the case is fully supported by Lord Shaw and Lord Parmoor: "My Lords, the discussion of the case by the noble and learned Lords who took part in the decision appears to me to exclude the hypothesis that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit. They must indeed be taken to have thought that the facts proved as to the relationship of the parties in *Derry v. Peek* were not enough to establish any special duty arising out of that relationship other than the general duty of honesty. But they do not say that where a different sort of relationship ought to be inferred from the circumstances the case is to be concluded by asking whether an action for deceit will lie."

There was in *Derry v. Peek*, as the report of the case shows, no plea of innocent or negligent misrepresentation and so their Lordships did not make any pronouncement on that. I am bound to say that had there been such a plea I am sure that the House would have rejected it. As Lord Haldane said, their Lordships must "be taken to have thought" that there was no liability in negligence. But what your Lordships may be taken to have thought, though it may exercise great influence upon those who thereafter have to form their own opinion on the subject, is not the law of England. It is impossible to say how their Lordships would have formulated the principle if they had laid one down. They might have made it general or they might have confined it to the facts of the case. They might have made an exception of the sort indicated by Lord Herschell or they might not. This is speculation. All that is certain is that on this point the House laid down no law at all.

Clearly in *Le Lievre v. Gould* it was thought that the House had done so. Lord Esher M.R. treated *Derry v. Peek* as restating the old law "that, in the absence of contract, an action for negligence cannot be maintained when there is no fraud." A. L. Smith L.J. stated the law in the same way. This is wrong and the House, in effect, said so in *Nocton v. Lord Ashburton*.

My Lords, I need not consider how far thereafter a court of equal authority was bound to follow *Le Lievre v. Gould*. It may be that the decision on the facts was correct even though the reasoning was too wide. There has been a difference of opinion about the effect of the decision: compare

Asquith L.J. in *Candler v. Crane, Christmas & Co.* with Denning L.J. Nor need I consider what part of the reasoning, if any, should be held to survive *Nocton v. Lord Ashburton*. It is clear that after 1914 it would be to *Nocton v. Lord Ashburton* and not to *Le Lievre v. Gould* that the lawyer would look in order to ascertain what the exceptions were to the general principle that a man is not liable for careless misrepresentation. I cannot feel, therefore that there is any principle enunciated in *Le Lievre v. Gould* which is now so deeply embedded in the law that your Lordships ought not to disturb it.

I come now to the case of *Nocton v. Lord Ashburton*, which both sides put forward as the most important of the authorities which your Lordships have to consider. The appellants say that it removed the restrictions which *Derry v. Peek* was thought to have put upon liability for negligent misrepresentation. The respondents say that it removed those restrictions only to a very limited extent, that is to say, by adding fiduciary obligation to contract as a source of special duty; and that it closed the door on any further expansion. I propose, therefore, to examine it with some care because it is not at all easy to determine exactly what it decided. Lord Haldane L.C. began his speech by saying: "Owing to the mode in which this case has been treated both by the learned judge who tried it and by the Court of Appeal, the question to be decided has been the subject of some uncertainty and much argument." He went on to say that the difficulties in giving relief were concerned with form and not with substance. The main difficulty, I think, lies in discovering from the statement of claim what the cause of action was. Lord Ashburton sought relief from the consequences of having advanced money on mortgage to several persons of whom the defendant Nocton was one. The statement of claim consists of a long narrative of events interspersed with complaints. Although in the end the vital fact was that Nocton was Lord Ashburton's solicitor, there is no allegation of any retainer and nothing is pleaded in contract. The fact that Nocton was a solicitor emerges only in the framing of the complaint in paragraph 13 where it was said that Nocton's advice to make the advance of £65,000 "was not that of a solicitor advising his client in good faith, but was given for his own private ends." The relief asked for in respect of this transaction is a declaration "that [the plaintiff] was improperly advised and induced by the defendant Nocton whilst acting as the plaintiff's confidential solicitor" to advance £65,000. In paragraphs 31 to 33 of the statement of claim it is related that the plaintiff was asked to release part of his security for the loan; and it is said that: "The defendant Nocton in advising the plaintiff to execute the said release allowed the plaintiff to believe that he was advising the plaintiff independently and in good faith and in the plaintiff's interest." No separate relief was sought in respect of this transaction.

Until the case reached this House no substantial point of law was raised. Neville J. at the trial held that the only issue raised by the statement of claim was whether the defendant Nocton was guilty of fraud and that the plaintiff had failed to prove it. The Court of Appeal agreed with the judge's view of the pleadings. Cozens-Hardy M.R. said that if damages had been claimed on the ground of negligence, the action would have been practically undefended. But it was then too late to amend the statement of claim, if only because a new cause of action would have been statute-barred. On the facts the Court of Appeal reversed in part the judge's finding of fraud, holding that there was fraud in relation to the release.

In this House at the conclusion of the appellant's argument the respondent's counsel was told that the House was unlikely to differ from the judgment of Neville J. on fraud. The pith of the respondent's argument is reported as follows: "Assuming that fraud is out of the question, the allegations in the statement of claim are wide enough to found a claim for dereliction of duty by a person occupying a fiduciary relation. In the old cases in equity the term 'fraud' was frequently applied to "cases of a breach of fiduciary obligation." He was then stopped.

It can now be understood why Lord Haldane regarded the question as one of form rather than of substance. The first question which the House had to consider was whether the statement of claim was wide enough to cover negligence. Lord Parmoor thought that it was and decided the appeal on that ground. So, I think, in the end did Lord Dunedin, but he also expressed his agreement with the opinion of Lord Haldane L.C. Lord Haldane, With whom Lord Atkinson concurred, thought that

possibly negligence was covered, but he did not take the view that the statement of claim must be interpreted either as an allegation of deceit or as an allegation of negligence. He said: "There is a third form of procedure to which the statement of claim approximated very closely, and that is the old bill in Chancery to enforce compensation for breach of a fiduciary obligation. There appears to have been an impression that the necessity which recent authorities have established of proving moral fraud in order to succeed in an action of deceit has narrowed the scope of this remedy. For the reasons which I am about to offer to your Lordships, I do not think that this is so." The Lord Chancellor then went on to examine *Derry v. Peek*. in order to determine exactly what it had decided.

I find most interest for present purposes in the speech of Lord Shaw. He held that the pleadings disclosed "a claim for liability upon a ground quite independent of fraud, namely, of misrepresentations and misstatements made by a person entrusted with a duty to another, and in failure of that duty." He posed what he considered to be the crucial question: What was the relation in which the parties stood to each other. at the time of the transaction? "He stated that the defendant was Lord Ashburton's solicitor and so under a duty to advise. He concluded in the following terms: "... once the relations of parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer, although the information and advice have been given not fraudulently but in good faith. It is admitted in the present case that misrepresentations were made; that they were material; that they were the cause of loss; that they were made by a solicitor to his client in a situation in which the client was entitled to rely, and did rely, upon the information received. I accordingly think that that situation is plainly open for the application of the principle of liability to which I have referred, namely, liability for the consequences of a failure of duty in circumstances in which it was a matter equivalent to contract between the parties that that duty should be fulfilled." Lord Shaw does not anywhere in his speech refer to the relationship as being of a fiduciary character.

Lord Haldane L.C. laid down the general principle in much the same terms. He said: "Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is nonetheless true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement." It is quite true that Lord Haldane L.C. applied this principle only to cases of breach of fiduciary duty. But that was inevitable on the facts of the case since upon the view of the pleadings on which he was proceeding it was necessary to show equitable fraud.

In my judgment, the effect of this case is as follows. The House clearly considered the view of *Derry v. Peek*, exemplified in *Le Lievre v. Gould*, too narrow. It considered that outside contract (for contract was not pleaded in the case), there could be a special relationship between parties which imposed a duty to give careful advice and accurate information. The majority of their Lordships did not extend the application of this principle beyond the breach of a fiduciary obligation but none of them said anything at all to show that it was limited to fiduciary obligation. Your Lordships can, therefore, proceed upon the footing that there is such a general principle and that it is for you to say to what cases, beyond those of fiduciary obligation, it can properly be extended.

I shall not at this stage deal in any detail with *Robinson v. National Bank of Scotland Ltd*. Its chief relevance is to Mr. Foster's second point. All that need be said about it on his first point is that it is no authority for the proposition that those relationships which give rise to a special duty of care are limited to the contractual and the fiduciary. On the contrary, it is a clear authority for the view that Lord Haldane did not mean the general principle he stated in *Nocton v. Lord Ashburton* to be limited to fiduciary relationships. He said that he wished emphatically to repeat what he had said

in *Nocton v. Lord Ashburton*, that it would be a great mistake to suppose that the principle in *Derry v. Peek* affected the freedom of action of the courts in recognising special duties arising out of other kinds of relationship. He went on: "The whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the courts may find to exist in particular cases, still remains, and I should be very "sorry if any word fell from me which should suggest that the courts are in any way hampered in recognising that the duty of care may be established when such cases really occur."

I come next to *Donoghue v. Stevenson*. In his celebrated speech in that case Lord Atkin did two things. He stated what he described as a "general conception" and from that conception he formulated a specific proposition of law. In between he gave a warning "against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted."

What Lord Atkin called a "general conception of relations giving rise to a duty of care" is now often referred to as the principle of proximity. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In the eyes of the law your neighbour is a person who is so closely and directly affected by your act that you ought reasonably to have him in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question.

The specific proposition arising out of this conception is that "a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

Now, it is not, in my opinion, a sensible application of what Lord Atkin was saying for a Judge to be invited on the facts of any particular case to say whether or not there was "proximity" between the plaintiff and the defendant. That would be a misuse of a general conception and it is not the way in which English law develops. What Lord Atkin did was to use his general conception to open up a category of cases giving rise to a special duty. It was already clear that the law recognised the existence of such a duty in the category of articles that were dangerous in themselves. What *Donoghue v. Stevenson* did may be described either as the widening of an old category or as the creation of a new and similar one. The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time comes when the cell divides.

Lord Thankerton and Lord Macmillan approached the problem fundamentally in the same way, though they left any general conception on which they were acting to be implied. They inquired directly - Lord Thankerton and Lord Macmillan - whether the relationship between the plaintiff and the defendant was such as to give rise to a duty to take care. It is significant, whether it is a coincidence or not, that the term "special relationship" used by Lord Thankerton is also the one used by Lord Haldane in *Nocton v. Lord Ashburton*. The field is very different but the object of the search is the same.

In my opinion, the appellants in their argument tried to press *Donoghue v. Stevenson* too hard. They asked whether the principle of proximity should not apply as well to words as to deeds. I think it should, but as it is only a general conception it does not get them very far. Then they take the specific proposition laid down by *Donoghue v. Stevenson* and try to apply it literally to a certificate or a banker's reference. That will not do, for a general conception cannot be applied to pieces of paper in the same way as to articles of commerce or to writers in the same way as to manufacturers. An inquiry into the possibilities of intermediate examination of a certificate will not be fruitful. The real value of *Donoghue v. Stevenson* to the argument in this case is that it shows

how the law can be developed to solve particular problems. Is the relationship between the parties in this case such that it can be brought within a category giving rise to a special duty? As always in English law, the first step in such an inquiry is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight.

It would be surprising if the sort of problem that is created by the facts of this case had never until recently arisen in English law. As a problem it is a by-product of the doctrine of consideration. If the respondents had made a nominal charge for the reference, the problem would not exist. If it were possible in English law to construct a contract without consideration, the problem would move at once out of the first and general phase into the particular; and the question would be, not whether on the facts of the case there was a special relationship, but whether on the facts of the case there was a contract.

The respondents in this case cannot deny that they were performing a service. Their sheet anchor is that they were performing it gratuitously and therefore no liability for its performance can arise. My Lords, in my opinion this is not the law. A promise given without consideration to perform a service cannot be enforced as a contract by the promisee; but if the service is in fact performed and done negligently, the promisee can recover in an action in tort. This is the foundation of the liability of a gratuitous bailee. In the famous case of *Coggs v. Bernard*, where the defendant had charge of brandy belonging to the plaintiff and had spilt a quantity of it, there was a motion in arrest of judgment "for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had anything for his pains." The declaration was held to be good notwithstanding that there was not any consideration laid. Gould J. said: "The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect." This proposition is not limited to the law of bailment. In *Skelton v. London & North Western Railway Co.* Willes J. applied it generally to the law of negligence. He said: "Actionable negligence must consist in the breach of some duty ... if a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs v. Bernard*." Likewise in *Banbury v. Bank of Montreal*, where the bank had advised a customer on his investments, Lord Finlay L.C. said: "He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently."

The principle has been applied to cases where as a result of the negligence no damage was done to person or to property and the consequential loss was purely financial. In *Wilkinson v. Coverdale* the defendant undertook gratuitously to get a fire policy renewed for the plaintiff, but, in doing so, neglected formalities, the omission of which rendered the policy inoperative. It was held that an action would lie. In two similar cases the defendants succeeded on the ground that negligence was not proved in fact. Both cases were thus decided on the basis that in law an action would lie. In the first of them, *Shiells v. Blackburne*, the defendant had, acting voluntarily and without compensation, made an entry of the plaintiff's leather as wrought leather instead of dressed leather, with the result that the leather was seized. In *Dartnall v. Howard & Gibbs* the defendants purchased an annuity for the plaintiff but on the personal security of two insolvent persons. The court, after verdict, arrested the judgment upon the ground that the defendants appeared to be gratuitous agents and that it was not averred that they had acted either with negligence or dishonesty.

Many cases could be cited in which the same result has been achieved by setting up some nominal consideration and suing in contract instead of in tort. In *Coggs v. Bernard* Holt C.J. put the obligation on both grounds. He said: "... secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but nudum pactum. But to this I answer, that the owners trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. and if a man will do that,

and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing."

*De La Bere v. Pearson Ltd.* is an example of a case of this sort decided on the ground that there was a sufficiency of consideration. The defendants advertised in their newspaper that their city editor would answer inquiries from readers of the paper desiring financial advice. The plaintiff asked for the name of a good stockbroker. The editor recommended the name of a person whom he knew to be an outside broker and whom he ought to have known, if he had made proper inquiries, to be an undischarged bankrupt. The plaintiff dealt with him and lost his money. The case being brought in contract, Vaughan Williams L.J. thought that there was sufficient consideration in the fact that the plaintiff consented to the publication of his question in the defendants' paper if the defendants so chose. For Barnes P. the consideration appears to have lain in the plaintiff addressing an inquiry as invited. In the same way when in *Everett v. Griffiths* the Court of Appeal was considering the liability of a doctor towards the person he was certifying, Scrutton L.J. said that the submission to treatment would be a good consideration.

My Lords, I have cited these instances so as to show that in one way or another the law has ensured that in this type of case a just result has been reached. But I think that today the result can and should be achieved by the application of the law of negligence and that it is unnecessary and undesirable to construct an artificial consideration. I agree with Sir Frederick Pollock's note on the case of *De La Bere v. Pearson Ltd.* where he said in *Contracts*, 13th ed., p. 140, that "the cause of action is better regarded as arising from default in the performance of a voluntary undertaking independent of contract."

My Lords, it is true that this principle of law has not yet been clearly applied to a case where the service which the defendant undertakes to perform is or includes the obtaining and imparting of information. But I cannot see why it should not be: and if it had not been thought erroneously that *Derry v. Peek* negated any liability for negligent statements, I think that by now it probably would have been. It cannot matter whether the information consists of fact or of opinion or is a mixture of both, nor whether it was obtained as a result of special inquiries or comes direct from facts already in the defendant's possession or from his general store of professional knowledge. One cannot, as I have already endeavoured to show, distinguish in this respect between a duty to inquire and a duty to state.

I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Nocton v. Lord Ashburton* are "equivalent to contract," that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit when it was good.

I have had the advantage of reading all the opinions prepared by your Lordships and of studying the terms which your Lordships have framed by way of definition of the sort of relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them. I do not understand any of your Lordships to hold that it is a

responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction. In the present case the appellants were not, as in *Woods v. Martins Bank Ltd.*, the customers or potential customers of the bank. Responsibility can attach only to the single act, that is, the giving of the reference, and only if the doing of that act implied a voluntary undertaking to assume responsibility. This is a point of great importance because it is, as I understand it, the foundation for the ground on which in the end the House dismisses the appeal. I do not think it possible to formulate with exactitude all the conditions under which the law will in a specific case imply a voluntary undertaking any more than it is possible to formulate those in which the law will imply a contract. But in so far as your Lordships describe the circumstances in which an implication will ordinarily be drawn, I am prepared to adopt any one of your Lordships' statements as showing the general rule: and I pay the same respect to the statement by Denning L.J. in his dissenting judgment in *Candler v. Crane, Christmas & Co.* about the circumstances in which he says a duty to use care in making a statement exists.

I do not go further than this for two reasons. The first is that I have found in the speech of Lord Shaw in *Nocton v. Lord Ashburton* and in the idea of a relationship that is equivalent to contract all that is necessary to cover the situation that arises in this case. Mr. Gardiner does not claim to succeed unless he can establish that the reference was intended by the respondents to be communicated by the National Provincial Bank to some unnamed customer of theirs, whose identity was immaterial to the respondents, for that customer's use. All that was lacking was formal consideration. The case is well within the authorities I have already cited and of which *Wilkinson v. Coverdale* is the most apposite example.

I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former *Nocton v. Lord Ashburton* has long stood as the authority and for the latter there is the decision of Salmon J. in *Woods v. Martins Bank Ltd.* which I respectfully approve. There may well be others yet to be established. Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.

I regard this proposition as an application of the general conception of proximity. Cases may arise in the future in which a new and wider proposition, quite independent of any notion of contract, will be needed. There may, for example, be cases in which a statement is not supplied for the use of any particular person. any more than in *Donoghue v. Stevenson* the ginger beer was supplied for consumption by any particular person; and it will then be necessary to return to the general conception of proximity and to see whether there can be evolved from it, as was done in *Donoghue v. Stevenson*, a specific proposition to fit the case. When that has to be done, the speeches of your Lordships today as well as the judgment of Denning L.J. to which I have referred - and also, I may add, the proposition in the American Restatement of the Law of Torts, Vol. III, p. 122, para. 552, and the cases which exemplify it - will afford good guidance as to what ought to be said. I prefer to see what shape such cases take before committing myself to any formulation, for I bear in mind Lord Atkin's warning, which I have quoted, against placing unnecessary restrictions on the adaptability of English law. I have, I hope, made it clear that I take quite literally the dictum of Lord Macmillan, so often quoted from the same case, that "the categories of negligence are never closed." English law is wide enough to embrace any new category or proposition that exemplifies the principle of proximity.

I have another reason for caution. Since the essence of the matter in the present case and in others of the same type is the acceptance of responsibility, I should like to guard against the imposition of restrictive terms notwithstanding that the essential condition is fulfilled. If a defendant says to a plaintiff: Let me do this for you; do not waste your money in employing a professional, I

will do it for nothing and you can rely on me," I do not think he could escape liability simply because he belonged to no profession or calling, had no qualifications or special skill and did not hold himself out as having any. The relevance of these factors is to show the unlikelihood of a defendant in such circumstances assuming a legal responsibility, and as such they may often be decisive. But they are not theoretically conclusive and so cannot be the subject of definition. It would be unfortunate if they were. For it would mean that plaintiffs would seek to avoid the rigidity of the definition by bringing the action in contract as in *De Le Bere v. Pearson Ltd.* and setting up something that would do for consideration. That, to my mind would be an undesirable development in the law; and the best way of avoiding it is to settle the law so that the presence or absence of consideration makes no difference.

Your Lordships' attention was called to a number of cases in courts of first instance or of appeal which it was said would have been decided differently if the appellants' main contention was correct. I do not propose to go through them in order to consider whether on the facts of each it should or should not be upheld. I shall content myself with saying that, in my opinion, *Le Lievre v. Gould* and all decisions based on its reasoning (in which I specifically include, lest otherwise it might be thought that generalia specialibus non derogant, the decision of Devlin J. in *Heskell v. Continental Express Ltd.* can no longer be regarded as authoritative; and, when similar facts arise in the future, the case will have to be judged afresh in the light of the principles which the House has now laid down.

My Lords, I have devoted much time and thought to considering the first reason given by Mr. Foster for rejecting the appellants' claim. I have done so not only because his reason was based on a ground so fundamental that it called for a full refutation, but also because it is impossible to find the correct answer on the facts to the appellants' claim until the relevant criteria for ascertaining whether or not there is a duty to take care have been clearly established. Once that is done, their application to the facts of this case can be done very shortly, for the case then becomes a very simple one.

I am satisfied, for the reasons I have given, that a person for whose use a banker's reference is furnished is not, simply because no consideration has passed, prevented from contending that the banker is responsible to him for what he has said. The question is whether the appellants can set up a claim equivalent to contract and rely on an implied undertaking to accept responsibility. Mr. Foster's second point is that in *Robinson v. National Bank of Scotland Ltd.* this House has already laid it down as a general rule that in the case of a banker furnishing a reference that cannot be done. I do not agree. The facts in that case have been stated by my noble and learned friend Lord Reid, and I need not repeat them. I think it is plain upon those facts that the bank in that case was not furnishing the reference for the use of the pursuer; he was not a person for whose use of the reference they were undertaking any responsibility, and that quite apart from their general disclaimer. Furthermore, the pursuer never saw the reference; he was given only what the Lord Justice-Clerk described as "a gloss of it." This makes the connection between the pursuer and the defendants far too remote to constitute a relationship of a contractual character.

On the facts of the present case Mr. Foster has under his third head argued for the same result. He submits, first, that it ought not to be inferred that the respondents knew that the National Provincial Bank were asking for the reference for the use of a customer. If the respondents did know that, then Mr. Foster submits that they did not intend that the reference itself should be communicated to the customer; it was intended only as material upon which the customer's bank could advise the customer on its own responsibility. I should consider it necessary to examine these contentions were it not for the general disclaimer of responsibility which appears to me in any event to be conclusive. I agree entirely with the reasoning and conclusion on this point of my noble and learned friend, Lord Reid. A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not. The problem of reconciling words of exemption with the existence of a duty arises only when a party is claiming exemption from a responsibility which he has already undertaken or which he is contracting to undertake. For this reason alone, I would dismiss the appeal.



## LORD PEARCE

My Lords, "although liability for negligence in word," said Lord Haldane in *Nocton v. Lord Ashburton*, has in material respects been developed in our law differently from liability for negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement."

The law of negligence has been deliberately limited in its range by the courts' insistence that there can be no actionable negligence *in vacuo* without the existence of some duty to the plaintiff. For it would be impracticable to grant relief to everybody who suffers damage through the carelessness of another.

The reason for some divergence between the law of negligence in word and that of negligence in act is clear. Negligence in word creates problems different from those of negligence in act. Words are more volatile than deeds. They travel fast and far afield. They are used without being expended and take effect in combination with innumerable facts and other words. Yet they are dangerous and can cause vast financial damage. How far they are relied on unchecked (by analogy with there being no probability of intermediate inspection - see *Grant v. Australian Knitting Mills Ltd.* must in many cases be a matter of doubt and difficulty. If the mere hearing or reading of words were held to create proximity, there might be no limit to the persons to whom the speaker or writer could be liable. Damage by negligent acts to persons or property on the other hand is more visible and obvious; its limits are more easily defined, and it is with this damage that the earlier cases were more concerned. It was not until 1789 that *Pasley v. Freeman* recognised and laid down a duty of honesty in words to the world at large - thus creating a remedy designed to protect the economic as opposed to the physical interests of the community. Any attempts to extend this remedy by imposing a duty of care as well as a duty of honesty in representations by word were curbed by *Derry v. Peek*.

In *Cann v. Willson* it had been held that a valuer was liable in respect of a negligent valuation which he had been employed by the owner of property to make for the purpose of raising a mortgage, and which the valuer himself put before the proposed mortgagee's solicitor. Chitty J. there said: "It seems to me that the defendants knowingly placed themselves in that position, and in point of law incurred a duty towards him to use reasonable care in the preparation of the document Galled a valuation. I think it is like the case of the supply of an article - the supply of the hairwash in the case of *George v. Skivington*," later approved in *Donoghue v. Stevenson*. Thus in the case of economic damage alone he was drawing an analogy from a case where physical damage to the wife of a purchaser was held to give rise to an action for negligence.

*Cann v. Willson* was, however, overruled by *Le Lievre v. Gould* on the ground, erroneous as it seems to me, that it could not stand with *Derry v. Peek*. The particular facts in *Le Lievre v. Gould* justified the particular decision, as Denning L.J. explained in *Candler v. Crane, Christmas & Co.* But the ratio decidendi was wrong since it attributed to *Derry v. Peek* more than that case decided. In *Nocton v. Lord Ashburton* this House pointed out that too much had been ascribed to *Derry v. Peek*. Lord Haldane said: "The discussion of the case by the noble and learned lords who took part in the decision appears to me to exclude the hypothesis that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit. They must indeed be taken to have thought that the facts proved as to the relationship of the parties in *Derry v. Peek* were not enough to establish any special duty arising out of that relationship other than the general duty of honesty. But they do not say that where a different sort of relationship ought to be inferred from the circumstances the case is to be concluded by asking

whether an action for deceit will lie. I think that the authorities subsequent to the decision of the House of Lords, show a tendency to assume that it was intended to mean more than it did. In reality the judgment covered only a part of the field in which liabilities may arise. There are other obligations besides that of honesty, the breach of which may give a right to damages. These obligations depend on principles which the judges have worked out in the fashion that is characteristic of a system where much of the law has always been judge-made and unwritten." Lord Haldane spoke to a like effect in *Robinson v. National Bank of Scotland Ltd.*: "I think, as I said in *Nocton's* case, that an exaggerated view was taken by a good many people of the scope of the decision in *Derry v. Peek*. The whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the court may find to exist in particular cases, still remains, and I should be very sorry if any word fell from me which should suggest that the courts are in any way hampered in recognising that the duty of care may be established when such cases really occur." Lord Haldane was thus in terms preserving unencumbered the area of special relationships which created a duty of care; and he was not restricting the area to cases where courts of equity would find a fiduciary duty.

The range of negligence in act was greatly extended in *Donoghue v. Stevenson* on the wide principle of the good neighbour; sic utere tuo ut alienum non laedas. It is argued that the principles enunciated in *Donoghue v. Stevenson*, apply fully to negligence in word. It may well be that Wrottesley J. in *Old Gate Estates Ltd.* put the matter too narrowly when he confined the applicability of the principles laid down in *Donoghue v. Stevenson* to negligence which caused damage to life, limb or health. But they were certainly not purporting to deal with such issues as, for instance, how far economic loss alone, without some physical or material damage to support it, can afford a cause of action in negligence by act. See *Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners)*, where it was held that it could do so. The House in *Donoghue v. Stevenson* was, in fact, dealing with negligent acts causing physical damage, and the opinions cannot be read as if they were dealing with negligence in word causing economic damage. Had it been otherwise some consideration would have been given to problems peculiar to negligence in words. That case, therefore, can give no more help in this sphere than by affording some analogy from the broad outlook which it imposed on the law relating to physical negligence.

How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others. Economic protection has lagged behind protection in physical matters where there is injury to person and property. It may be that the size and the width of the range of possible claims has acted as a deterrent to extension of economic protection.

In this sphere the law was developed in the United States in *Glanzer v. Shepherd*, where a public weigher employed by a vendor was held liable to a purchaser for giving him a certificate which negligently overstated the amount of the goods supplied to him. The defendant was thus engaged on a task in which, as he knew, vendor and purchaser alike depended on his skill and care and the fact that it was the vendor who paid him was merely an accident of commerce. This case was followed and developed in later cases.

In the *Ultramares* case, however, the court felt the undesirability of exposing defendants to a potential liability "in an indeterminate amount for an indefinite time to an indeterminate class." It decided that auditors were not liable for negligence in the preparation of their accounts (of which they supplied thirty copies, although they were not aware of the specific purpose, namely, to obtain financial help) to a plaintiff who lent money on the strength of them.

In South Africa, under a different system of law, two cases show a similar advance and subsequent restriction (*Perlman v. Zoukendyk* and *Herschel v. Mrupi*).

Some guidance may be obtained from the case of *Shiells v. Blackburne*. There a general merchant undertook voluntarily and without reward to enter a parcel of the goods of another, together with a

parcel of his own of the same sort, at the Customs House for exportation. Acting, it was contended, with gross negligence, he made the entry under a wrong denomination whereby both parcels were seized. The plaintiff failed on the facts to make out a case of gross negligence. But Lord Loughborough said: "... where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailie is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or a clerk in the Custom House, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries." Heath J. said: "... the surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable."

In *Gladwell v. Steggall* an infant plaintiff, 10 years old, recovered damages for injury to health from a surgeon and apothecary who had treated her. She did not sue in contract but brought an action ex delicto alleging a breach of duty arising out of his employment by her, although it was her father to whom the bill was made out. and in *Wilkinson v. Coverdale*, Lord Kenyon accepted the proposition that a defendant who had gratuitously undertaken to take out an insurance policy, and who did it negligently, could be liable in damages.

In those cases there was no dichotomy between negligence in act and in word, nor between physical and economic loss. The basis underlying them is that if persons holding themselves out in a calling or situation or profession take on a task within that calling or situation or profession, they have a duty of skill and care. In terms of proximity one might say that they are in particularly close proximity to those who, as they know, are relying on their skill and care although the proximity is not contractual.

The reasoning of *Shiells v. Blackburne* was applied in *Everett v. Griffiths*, where the Court of Appeal held that a doctor owed a duty of care to a man by whom he was not employed but whom he had a duty to examine under the Lunacy Act. It was also relied on by Denning L.J. in his dissenting judgment in *Candler v. Crane, Christmas & Co.* He reached the conclusion that in respect of reports and work that resulted in such reports there was a duty of care laid on "those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts and other things. and to make reports on which other people - other than their clients - rely in the ordinary course of business." The duty is, in his opinion, owed (apart from contractual duty to their employer) to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them." He excludes strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to hand their accounts. "The test of proximity in these cases is. did the accountants know that the accounts were required for submission to the plaintiff and use by him?" (It is to be noted that these expressions of opinion produce a result somewhat similar to the American Restatement of the Law of Tort, vol. III, p. 122, para. 552.) I agree with those words. In my opinion, they are consonant with the earlier cases and with the observations of Lord Haldane.

It is argued that so to hold would create confusion in many aspects of the law and infringe the established rule that innocent misrepresentation gives no right to damages. I cannot accept that argument. The true rule is that innocent misrepresentation per se gives no right to damages. If the misrepresentation intended by the parties to form a warranty between two contracting parties, it gives on that ground a right to damages *Symons & Co. v. Buckleton*. If an innocent misrepresentation is made between parties in a fiduciary relationship it may, on that ground, give a right to claim damages for negligence. There is also, in my opinion, a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded.

Was there such a special relationship in the present case as to impose on the defendants a duty of care to the plaintiffs as the undisclosed principals for whom the National Provincial Bank was making the inquiry? The answer to that question depends on the circumstances of the transaction. If, for instance, they disclosed a casual social approach to the inquiry, no such special relationship or duty of care would be assumed (see *Fish v. Kelly*). To import such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer. It is conceded that Salmon J. rightly found a duty of care in *Woods v. Martins Bank Ltd.* but the facts in that case were wholly different from those in the present case. A most important circumstance is the form of the inquiry and of the answer. Both were here plainly stated to be without liability. Mr. Gardiner argues that those words are not sufficiently precise to exclude liability for negligence. Nothing, however, except negligence could, in the facts of this case, create a liability (apart from fraud, to which they cannot have been intended to refer and against which the words would be no protection, since they would be part of the fraud). I do not, therefore, accept that even if the parties were already in contractual or other special relationship the words would give no immunity to a negligent answer. But in any event they clearly prevent a special relationship from arising. They are part of the material from which one deduces whether a duty of care and a liability for negligence was assumed. If both parties say expressly (in a case where neither is deliberately taking advantage of the other) that there shall be no liability, I do not find it possible to say that a liability was assumed.

In *Robinson v. National Bank of Scotland Ltd.* also the correspondence expressly excluded responsibility. Possibly that factor weighed with Lord Haldane when he said: "But when a mere inquiry is made by one banker of another, who stands in no special relation to him, then, in the absence of special circumstances from which a contract to be careful can be inferred, I think there is no duty excepting the duty of common honesty to which I have referred." I appreciate Mr. Gardiner's emphasis on the general importance to the business world of bankers' references and the desirability that in an integrated banking system there should be a duty of care with regard to them, but on the facts before us it is in my opinion not possible to hold that there was a special duty of care and a liability for negligence.

I would therefore dismiss the appeal.

### **Representation**

Solicitors: Evill & Coleman ; Franks, Charlesly & Co .  
Appeal dismissed. (F. C. )

## 9. *Hinz v. Berry* [1970] 2 QB 40: Court of Appeal

Court of Appeal: Lord Denning M.R., Lord Pearson and Sir Gordon Willmer: 1970 Jan.16

### APPEAL from O'Connor J.

The defendant, Anthony Paul Berry, appealed against the decision of O'Connor J. on June 4, 1969, awarding the plaintiff, Evelyn Frances Hinz, widow, inter alia, £4,000 damages on her personal claim for damages arising out of the death of her husband, Charles Hinz, on April 19, 1964.

The grounds of appeal were that the judge's assessment of damages was wrong in principle in that it was wholly excessive in the circumstances.

The facts are fully stated in the judgments.

*George Carman* for the appellant defendant. This is a tragic case; a family tragedy. But the award of £4,000 damages for nervous shock is too high. The correct principles were stated by Paull J. in *Schneider v. Eisovitch* [1960] 2 Q.B. 430, 440-442. In *Tregoning v. Hill*, *The Times*, March 2, 1965, Paull J. awarded £ 750 damages for the fact that seeing her husband suffer injuries from which he died within a week added to the plaintiff's depressed state of mind.

There are five causes of the plaintiff's depressed state in the present case: the plaintiff's grief and sorrow; her anxiety about the children; the financial strain caused by the death of her husband; the difficulty of adjusting to a new life; and the shock of witnessing the accident. Damages can only be recovered for the actual shock caused by seeing the accident, the last of the five causes.

There are four distinguishing features in the present case: (1) there was no physical injury caused to the plaintiff; (2) she suffered no injury of a permanent character; (3) she suffered no incapacity sufficient to render in- treatment necessary; (4) she had had no reduction in earning capacity and no wage loss which has not been catered for. Sympathy for the plaintiff should not be allowed to inflate the damages.

*Kenneth Jupp Q.C., Esyr Lewis and F. J. M. Marr-Johnson* for the plaintiff respondent. O'Connor J. saw the plaintiff, who gave evidence in the witness- box, as did her doctor, Dr. Melville, who knew her before the accident which he said had changed her "from being a happy person to a person who is almost permanently miserable," and the consultant psychiatrist, Dr. McIlroy. Damages for nervous shock are difficult to assess, [Reference was made to *Kemp & Kemp, The Quantum of Damages*, 3rd ed. (1967) vol. 1, p. 650.] The judge applied the right principles. He found on the evidence that the plaintiff's state of morbid depression was due to her being present at the scene of the accident. The court should not interfere with his award.

*Carman* replied.

### LORD DENNING M.R.

It happened on April 19, 1964. It was bluebell time in Kent. Mr. and Mrs. Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child.

On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. They took all eight children with them. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. The husband, Mr. Hinz, was at the back of the Dormobile making the tea. Mrs. Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite side. There came along a Jaguar car driven by Mr. Berry, out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr. Hinz and the children. Mr. Hinz was

frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs. Hinz, hearing the crash, turned round and saw this disaster.

She ran across the road and did all she could. Her husband was beyond recall, but the children recovered.

An action has been brought on her behalf and on behalf of the children for damages against Mr. Berry, the defendant. The injuries to the children have been settled by various sums being paid. The pecuniary loss to Mrs. Hinz by reason of the loss of her husband has been found by the judge to be some £15,000; but there remains the question of the damages payable to her for her nervous shock - the shock which she suffered by seeing her husband lying in the road dying, and the children strewn about.

The law at one time said that there could not be damages for nervous shock: but for these last 25 years, it has been settled that damages can be given for nervous shock caused by the sight of an accident, at any rate to a close relative. Very few of these cases have come before the courts to assess the amount of damages. O'Connor J. fixed the damages at the sum of £4,000 for nervous shock. The defendant appeals, saying that the sum is too high.

I would like to pay at once a tribute to the insurance company for the considerate and fair way in which they have dealt with the case. In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant.

There are only two cases in which the quantum of damages for nervous shock has been considered. One is *Schneider v. Eisovitch* [1960] 2 Q.B. 430. The other, *Tregoning v. Hill*, The Times, March 2, 1965. But they do not help us here. Somehow or other the court has to draw a line between sorrow and grief for which damages are not recoverable, and nervous shock and psychiatric illness for which damages are recoverable. The way to do this is to estimate how much Mrs. Hinz would have suffered if, for instance, her husband had been killed in an accident when she was 50 miles away: and compare it with what she is now, having suffered all the shock due to being present at the accident. The evidence shows that she suffered much more by being present. I will consider first the grief and sorrow if she had *not* been present at the accident. The consultant psychiatrist from the hospital in Maidstone said: "It is common knowledge that there is a 'mourning period' for all of us, and that normally time dispels this. In the average person it might be a year, but in a predisposed person it can be greatly prolonged. ..."

Mrs. Hinz was not predisposed at all. She was a woman of great capacity, level-headed, hard working, happily married. She would have got over the loss of her husband in, say, a year.

Consider next her condition, as it is, due to being present at the accident. Two years after the accident, the consultant psychiatrist said: "There is no medical doubt at all that she is suffering from a morbid depression; she is now officially ill." He went on to give some of the symptoms. She said to him: "It does not seem worth going on. I feel I cannot cope at all. I get so dreadfully irritable with the children too. It is wrong but I feel like killing him," that is, the posthumous child. The consultant went on: "She feels exhausted, has frequent suicidal ruminations and at the same time is covered with guilt at being like this." The posthumous baby "now saddens her even more because it cries 'Dad, Dad,'" and one of the elder children persists in saying "You have not got a Dad"; and then the other fatherless children join in the chorus." The consultant concluded: "In other circumstances I would probably have brought her into hospital, at least for a rest, but possibly for electrical treatment and it may come to that yet."

At the trial, five years after the accident, she frequently broke down when giving her evidence. She brought the children to court. They were very well turned out. The judge summed up the matter in

this way: "I am satisfied that she was of so robust a character that she would have stood up to that situation, that she would have been hurt, sorrowful, in mourning, Yes; but in a state of morbid depression, No."

He awarded her £4,000 on this head. There is no suggestion that he misdirected himself. We can only interfere if it is a wholly erroneous estimate. I do not think it is erroneous. I would dismiss the appeal.

## **LORD PEARSON**

This is a case of considerable importance, because I think it is the first case in which the problem of assessing damages of this kind has come to the Court of Appeal. I would like to point out at the outset that this is an exceptional case. The circumstances of the accident as witnessed by the plaintiff were of an exceptionally horrifying and tragic character, and it is easy to believe that she suffered an extremely severe shock from witnessing it. She has been since the accident, for a period of not far short of six years, in a sad and depressed state.

Mr. Carman has given us a list of five causes of the depressed state, and he says, I think rightly, that these five causes have all been operating from the date of the accident until now. The first factor was her own inevitable grief and sorrow at losing her husband, a good husband who was also a good father to her family. That would have caused much sorrow and mourning in any event. Secondly, there was her anxiety about the welfare of her children who were injured in the accident. Thirdly, there was the financial stress resulting from the removal of this very hard-working breadwinner who took extra work in addition to his normal work. She may well have been in considerable financial difficulty. The fourth factor was the need for adjusting herself to a new life, which may well have been quite unusually severe in this case. Now, all those four factors are not compensatable, that is to say they are not proper subjects to be taken into account in assessing damages according to English law. and then we come to the fifth of the five substantial factors, and that is the shock of witnessing the accident. That is the only factor which is compensatable in the sense that I have explained.

It is not disputed that this factor is a proper subject for compensation. The only problem is one of assessment. Is the figure which has been awarded in respect of it a figure which is within the reasonable range? If this factor had been merely one out of five and they had all been more or less equal in their effect and there had been no special consequences attributable to this one, I would have thought the figure awarded was much too high. But the position here is rather different. It has been held - and there is evidence in support - that this factor of the extreme shock of witnessing the exceptionally tragic accident has produced a special and for the time being very disastrous consequence, namely, that this lady is not only in a sad and depressed state owing to the loss of her husband and perhaps a harassed state owing to the difficulty of looking after her family in this situation, but something more than that: she has been and still is in a positively morbid state. There is a recognisable psychiatric illness. The finding of the judge, as I understand his judgment - and I will read the relevant passage in a moment - is that this is a special consequence which has been added by the shock to what otherwise her condition would have been. The other matter I mention before reading the relevant passages in the judge's judgment is that, according to the medical prognosis, this most unhappy state of affairs, that the lady is not only sad and depressed but is in a morbid state of depression, is not expected to continue for very much longer after this case has been finally disposed of.

Now, having said that, I will read the relevant passages from the judge's judgment, because I think he has stated the principle correctly, and the only problem is whether the estimate which he has made on the basis of the principle can be regarded as within the proper range or not. He said: "I approach the problem by saying that the death of her husband in 1964 would in any event have been a very serious blow; so too would be the injury to her children. She plainly relied on the love and affection of her husband quite apart from his capacity as breadwinner. It must have caused a very serious upset to her. The injury to her children and their loss of a father and psychiatric

disturbance would again undoubtedly have preyed upon her mind, but I am satisfied that she was of so robust a character that she would have stood up to that situation; that she would have been hurt, sorrowful, in mourning, yes, but in a state of morbid depression, no, and it seems to me that she is entitled to be compensated effectively for the extreme mental anguish which she has suffered during the last five years as a result of being present at the scene of this disaster." and then, in a slightly later passage: "I do not think it correct to approach this case on the basis that her present troubles are permanent or anything like that. Unfortunately - and this is not the defendant's fault, and I do not cast any blame on the plaintiff's advisers - bringing this case to decision has taken a very long time. To some extent that must have operated on Mrs. Hinz's mind. No one suggests that she is other than a genuine woman, but it seems to me that after this case is decided, when damages have been assessed and money is available, her depression will subside. Basically she must remain of a strong character, and effectively I approach the problem, doing the best I can, of awarding her compensation for what, as I have already said, is the intense suffering which she has borne for the last five years and for some further time. ..."

Well, I am not sure that that last sentence is quite rightly expressed. It should not be for the whole of the mental anguish and suffering which she has been enduring during the last five or six years. It should be only for that additional element which has been contributed by the shock of witnessing the accident, and which would not have occurred if she had not suffered that shock. It is a difficult distinction to draw, but I think the judge has laid a proper foundation and has found a right ground of decision, namely, that where there is an extra element which has been added by the shock of witnessing the accident, that is a proper subject of compensation. On his findings in this case that that element in itself was the sole cause of the added morbidity, the recognisable psychiatric element in her present condition, that is a proper ground for a substantial sum of money to be awarded.

As to the sum itself, it has seemed to me since the beginning of the case and I still feel it is a high figure. I myself would have been inclined to award some lower figure; but it is well recognised that in cases of this kind different minds can take different views as to the proper figure, and if the figure awarded is within the reasonable range, then it is not right for the Court of Appeal to interfere. Indeed, it has been said that the Court of Appeal ought not to interfere on the ground only that the figure is too high unless it appears to be a wholly erroneous estimate of what the damages should be; and although I feel it is high, I am not able to say it is a wholly erroneous estimate, and for that reason I would dismiss the appeal.

#### **SIR GORDON WILLMER**

I have reached the same conclusion. I would like to emphasise once again that this is a very exceptional case, and I hope that that circumstance will be borne in mind should there be occasion in future to refer to what has been decided in the present case. I also regard it as an extremely difficult case. However, the medical evidence is exceptionally strong to show that the state of depression and anguish to which this plaintiff has been reduced over the past five years goes far beyond what one would ordinarily expect in the case of a lady deprived of her husband as the result of an accident. To my mind the evidence is conclusive to show that the reason for the additional suffering of the plaintiff is to be found in the fact that she was herself a personal witness of the tragedy. It is important to bear in mind that what has resulted is described by the psychiatrist who gave evidence as a "recognisable psychiatric illness." I think it is clear on the evidence that that illness is attributable, and really wholly attributable, to the nervous shock resulting from the actual witnessing of the accident. The judge found - and the medical evidence was amply sufficient to support him - that but for this the plaintiff "was of so robust a character that she would have stood up to that situation; that she would have been hurt, sorrowful, in mourning, yes, but in a state of morbid depression, no." It is for that state of morbid depression, an illness brought about by the nervous shock, that she is entitled to be compensated.

It seems to me that it is quite impossible to find any fault whatsoever with the manner in which the judge directed himself as to the principles to be applied. There has, however, during the argument



been some suggestion that, having correctly directed himself on the law, the judge very quickly forgot what he had himself said, and, no doubt quite unconsciously, allowed his natural sympathy for the plaintiff to run away with him, with the result that he awarded an inflated figure. I do not accept that criticism. I agree with my Lord that the sum at which the judge arrived was a high figure; but in this case we are in an area where the damages seem to me to be even more than usually at large. It is practically impossible to find any signposts on the road; there is no tariff or pattern of awards in this class of case; and this makes it very difficult for any one judge to criticise another judge's estimate of what the damages ought to be. I find myself quite unable to say that in this rather fluid state of affairs the sum at which the judge in the present case arrived was such as could fairly be described as a "wholly erroneous estimate." High as his award was, I think that no sufficient reason has been shown for interfering with it, and, accordingly, I agree that the appeal should be dismissed.

**Representation;** Solicitors: Gregory, Rowcliffe & Co. for John Gorna & Co., Manchester; Waterhouse & Co. for F. B. Jevons, Riley & Pope, Tonbridge, Kent.

Appeal dismissed with costs. No interest allowed on damages not yet paid. (A. H. B.)

## 10. *Regina (Jackson and others) v. Attorney General* [2006] 1 AC 262: HL

The Hunting Act 2004, which made the hunting of wild animals with dogs unlawful, received the Royal Assent in November 2004. It was enacted pursuant to section 2 of the Parliament Act 1911 which laid down the circumstances in which, save for stated exceptions, "any public Bill" could be enacted without the consent of the House of Lords, as amended by section 1 of the Parliament Act 1949. That provision reduced by a year the period which had to elapse before the Lords' consent could be dispensed with. The claimants, who opposed the banning of fox hunting, contended that the 1949 Act was invalid because the provisions of the 1911 Act had been relied on to enact it, whereas the 1911 Act could only be amended with the consent of the House of Lords. They sought declarations that the 1949 Act was not an Act of Parliament and was consequently of no legal effect and that, accordingly, the Hunting Act 2004 was not an Act of Parliament and was not of legal effect. The Divisional Court, dismissing the claim, held that, as a matter of ordinary statutory construction, section 2 of the 1911 Act allowed the enactment of legislation, without the consent of the House of Lords, which amended section 2 itself and that, therefore, the 1949 Act and the 2004 Act were valid. On the claimants' appeal the Court of Appeal affirmed the Divisional Court's decision on different grounds.

On the claimants' appeal-

Held, dismissing the appeal, that, having regard to the historical and constitutional context in which the Parliament Act 1911 had been enacted, its legislative purpose was not to enlarge the powers of the House of Commons or to delegate powers to it but to restrict the powers of the House of Lords, subject to specified conditions, to defeat measures supported by a majority in the Commons; that, on a proper interpretation, the 1911 Act, in enacting section 2(1) in language used only to denote primary legislation, created a parallel route by which, subject to stated exceptions, "any public Bill" introduced into the House of Commons could become an Act of Parliament; that the term "any" was to be understood in its broad colloquial sense and since stated exceptions had been expressly excluded from the ambit of section 2(1) there was no warrant from implying further exclusions; that there was no constitutional principle or principle of statutory construction which prohibited a legislature from altering its own constitution by enacting alterations to the instrument from which its powers derived by virtue of powers in the same instrument, if the powers extended so far; that in consequence, on a proper construction, the 1911 Act did not preclude use of the section 2(1) procedure to amend itself and a Bill having that effect might properly be passed under that procedure; and that, accordingly, the 1949 Act was an Act of Parliament of full legal effect, and the Hunting Act 2004 also was such an Act.

### OPINION OF LORD HOPE OF CRAIGHEAD

**104** Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.

**105** For the most part these qualifications are themselves the product of measures enacted by Parliament. Part I of the European Communities Act 1972 is perhaps the prime example. Although Parliament was careful not to say in terms that it could not enact legislation which was in conflict with Community law, that in practice is the effect of section 2(1) when read with section 2(4) of that Act. The direction in section 2(1) that Community law is to be recognised and available in law and is to be given legal effect without further enactment, which is the method by which the Community Treaties have been implemented, concedes the last word in this matter to the courts. The doctrine of the supremacy of Community law restricts the absolute authority of Parliament to legislate as it wants in this area. This plainly is how the matter would be viewed in Luxembourg: see Professor David Feldman, "None, One or Several? Perspectives on the UK's Constitution(s)" [2005] CLJ 329,

346-347; see also, for the practical effects in this country, *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603. Section 3(1) of the Human Rights Act 1998 has introduced a further qualification, as it directs the courts to read and give effect to legislation in a way that is compatible with the Convention rights. So long as it is possible to do so, the interpretative obligation enables the courts to give a meaning to legislation which is compatible even if this appears to differ from what Parliament had in mind when enacting it.

**106** It has been suggested that some of the provisions of the Acts of Union of 1707 (6 Anne c 11) (Scot c 7) are so fundamental that they lie beyond Parliament's power to legislate. Lord President Cooper in *MacCormick v Lord Advocate* [1953] SC 396, 411, 412 reserved his opinion on the question whether the provisions in article XIX of the Treaty of Union which purport to preserve the Court of Session and the laws relating to private right which are administered in Scotland are fundamental law which Parliament is not free to alter. Nevertheless by expressing himself as he did he went further than Dicey, *The Law of the Constitution*, 10th ed (1959), p 82 was prepared to go when he said simply that it would be rash of Parliament to abolish Scots law courts and assimilate the law of Scotland to \*304 that of England. In *Gibson v Lord Advocate* [1975] SC 136, 144, Lord Keith too reserved his opinion on this question and as to the justiciability of legislation purporting to abolish the Church of Scotland. In *Pringle, Petitioner* [1991] SLT 330, the First Division of the Court of Session again reserved its position on the effect of the Treaty of Union in a case which had been brought to challenge legislation which introduced the community charge in Scotland before it was introduced in England. But even Dicey himself was prepared to recognise that the statesmen of 1707 believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws: *Thoughts on the Scottish Union*, pp 252-253, quoted by Lord President Cooper in *MacCormick's case* [1953] SC 396, 412. So here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality.

**107** Nor should we overlook the fact that one of the guiding principles that were identified by Dicey at p 35 was the universal rule or supremacy throughout the constitution of ordinary law. Owen Dixon, "The Law and Constitution" (1935) 51 LQR 590, 596 was making the same point when he said that it is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law. In its modern form, now reinforced by the European Convention on Human Rights and the enactment by Parliament of the Human Rights Act 1998, this principle protects the individual from arbitrary government. The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. The fact that your Lordships have been willing to hear this appeal and to give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty.

**108** Dicey, at pp 47-48, said that the Septennial Act 1715 by which the legal duration of Parliament was extended from three to seven years, and by which an existing Parliament by its own authority prolonged its own existence, was at once the result and the standing proof of parliamentary sovereignty. No one doubts, of course, that it was open to Parliament to restrict its maximum duration to five years, which is the current rule: see section 7 of the Parliament Act 1911. But what are we to make of the fact that the restriction of the powers of the House of Lords which is set out in section 2(1) of that Act is expressly stated not to apply to a Money Bill and, more importantly, to a Bill containing any provision to extend the maximum duration of Parliament beyond five years. Is this to be regarded simply as a self-denying ordinance? Or is this another instance where Parliament has conceded the last word as to what it can do to the courts? And if it is the latter, how much further can the courts go in controlling the use of the procedure that section 2(1) has enacted? These are the questions that lie at the heart of this appeal.

**109** It is as well that I should stress however, before I go further, that this case is not about a contest between the courts and the executive. The Bill which has become the Hunting Act 2004 was a concession by the Government to prolonged and vigorous pressure from its own back benchers, notably Mr Tony Banks MP. It commanded a large majority in the House of Commons. The Speaker then took his own decision to endorse the Bill with his certificate under section 2(2) of the 1911 Act. This enabled the Bill to be presented for the Royal Assent to Her Majesty-although, by a curious twist of circumstances, it was in the House of Lords that the Royal Assent was declared to both Houses together by the Lords Commissioners under the procedure that applied immediately before Parliament was prorogued on 18 November 2004: see Erskine May, *Parliamentary Practice*, 23rd ed (2004), p 653. The Speaker was not directed to endorse the Bill by the executive. He was asserting the right of the House of Commons to get its measure through in the face of repeated refusals by the House of Lords to give its assent to it. What this case is about therefore is the place which the court occupies in our constitution with regard to the legislative sovereignty of Parliament.

### **Is there a justiciable issue?**

**110** The Attorney General said that it was for the elected legislature to have the final say in all matters of legislation. But he has not disputed that the courts can properly adjudicate on the issue raised in this appeal. In the Divisional Court Maurice Kay LJ said, at para 12, that he was wise not to do so. Doubt was cast on his position by the Court of Appeal. It said [2005] QB 579, para 11 that the Attorney General had given no convincing answer to its question whether the issue was justiciable. The answer which was given was that there was no absolute rule that the courts could not consider the validity of a statute and that the issue as to the validity of the Hunting Act 2004 was one of statutory interpretation. For my part I would regard this as a sufficient explanation for the position that the Attorney General has taken. It is reinforced by an examination of sections 3 and 4 of the 1911 Act. Section 3 provides that any certificate of the Speaker of the House of Commons given under the Act shall be conclusive for all purposes, and shall not be questioned in any court of law. The fact that this provision was enacted at all is an indication that Parliament itself appreciated that the question whether a Bill passed by the House of Commons alone was to receive effect as an Act of Parliament was in the final analysis one for the courts. As my noble and learned friend, Lord Bingham of Cornhill, has said, for the courts to entertain this question involves no breach of constitutional propriety. The words "in accordance with the provisions of the Parliament Act 1911 and by authority of the same" which appear in the Preamble to the 1949 Act, as directed by section 4 of the 1911 Act, provide courts with an issue that is justiciable.

**111** The debate as to whether the Parliament Act 1949 is a species of delegated legislation, as Sir Sydney Kentridge submitted, did not seem to me to be helpful in these circumstances. It is easy to see why a measure which purports to have been enacted in accordance with and with the authority of the 1911 Act cannot be described as delegated legislation, despite the support which, contrary to the position adopted by Professor de Smith, Professor Sir William Wade and Professor Hood Phillips gave to this argument: *Constitutional Fundamentals* (1980), pp 27-28. It is declared by section 2(1) of the 1911 Act that a Bill which has undergone the procedure that it describes, on the Royal Assent having been signified thereto, shall become an Act of Parliament. The status which is given to it is the antithesis of delegated legislation, the hallmark of which is that it is subordinate to legislation which has been enacted by Parliament. It is primary legislation, albeit enacted in a way that is different.

**112** But it does not follow from a rejection of this part of Sir Sydney's argument that the 1949 Act is immune from judicial scrutiny. It is enough for his purposes that the power of enactment on which the purported Act of Parliament relies is derived not from the common law but from another statute. If that is the case it is essential to the validity of the measure which purports to have been so enacted that it should indeed be what it purports to be. A document on the Parliamentary Roll is conclusive as to its validity as an Act if it shows on its face that everything has been done which the common law of the United Kingdom has prescribed for the making of an Act of Parliament-that

the Queen, the Lords and the Commons have assented to it: *The Prince's Case* (1606) 8 Co Rep 1a, 20b. All the court can do is look to the Parliamentary Roll. If it appears to have passed both Houses and received the Royal Assent that is the end of the inquiry, as Lord Campbell explained in *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710, 724-725. But an Act passed under the 1911 Act does not measure up to that test. The enacting words "carry its death's wound in itself", as it was put in *R v Countess of Arundel* (1617) Hobart 109, 111. This is not to say that the law may not be changed by a measure passed by one House of Legislature alone if this has been provided for by Parliament. But the common law does not say that the mere fact that such a measure asserts that it is such a measure is conclusive as its validity.

**113** Nor does it seem to me to be helpful, against this background, to describe the 1911 Act as having remodelled or redefined Parliament. The concept is not an easy one to grasp, because it is a fundamental aspect of the rule of sovereignty that no Parliament can bind its successors. There are no means whereby, even with the assistance of the most skilful draftsman, it can entrench an Act of Parliament. It is impossible for Parliament to enact something which a subsequent statute dealing with the same subject matter cannot repeal. But there is no doubt that, in practice and as a matter of political reality, the 1911 Act did have that effect. As its long title states, it made provision with respect to the powers of the House of Lords in relation to those of the House of Commons. It did what it was designed to do. It has limited the power of the House of Lords to legislate. In practice it has altered the balance of power between the two Houses.

**114** In his introduction to the 10th edition (1959) of Dicey, *An Introduction to the Study of the Law of the Constitution*, p xcvi, Professor E C S Wade said that it was difficult to assess the validity of Dicey's conclusion that the Act greatly increased the share of sovereignty possessed by the House of Commons so long as the House of Lords of its own accord accepted the rule that it is not entitled to reject legislation which has been passed by the House of Commons. He noted, at pp clxix-clxx, that, as from 1915 to 1945 coalition or national governments held office for the greater part of the time, the causes which produced this type of government were unlikely to produce the conditions which would lead to a conflict between the two Houses. More recent experience of governments elected by a substantial majority has created the conditions for this conflict. The way the House of Lords has reacted to this situation suggests that the sovereignty of the elected House has indeed been strengthened, despite the fact that since the change its composition by the exclusion of hereditary peers by section 1 of the House of Lords Act 1999 the House of Lords has tended to be more vigorous in its opposition to legislation of which it disapproves.

**115** Nevertheless the question still remains whether a measure which purports to have been passed into law under the procedure, and for that reason to be an Act of Parliament, is what it bears to be. The House of Commons, acting alone, has no inherent power to legislate. The only power which it has to legislate on its own is that described in section 2(1).

**116** The certificate of the Speaker under section 2(2) that the provisions of that section have been duly complied with cannot be questioned. That settles the issue as whether the procedure that the section sets out has been complied with. In the words of Professor J D B Mitchell, *Constitutional Law*, 2nd ed (1968), p 150, such matters of parliamentary procedure are reserved for decision by parliamentary machinery. But it does not settle the issue as to whether the Act can be said to have been presented to Her Majesty by authority of the 1911 Act. As Professor *Denis v Cowen* has suggested, the conclusiveness of a Speaker's certificate under this Act relates only to what it properly certifies: "Legislature and Judiciary" (1953) 16 MLR 273, 279, footnote 29. There remains the question what the 1911 Act has authorised, and this includes the question mentioned by Professor Cowen in the same footnote as to whether the Speaker could competently give a certificate under that Act if an attempt were to be made to prolong the life of Parliament beyond five years by legislation without the consent of both Houses. This is a question which has to be resolved upon a proper interpretation of the words used in section 2(1). This is a question of law for the courts, not for Parliament. Indeed, as Professor E C S Wade put it in his introduction to Dicey, pp xlvii-xlviii, by asserting their jurisdiction in this matter the courts can say that they are applying the express will of Parliament.

## Are there limits to the use of section 2(1)?

**117** The procedure which section 2(1) of the 1911 Act prescribes is available, as its opening words declare, in the case of "any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years)" The words in parenthesis indicate that, whatever else the procedure that section 2(1) authorises, it does not extend to Bills which are Money Bills or to Bills extending the maximum duration of Parliament.

**118** The exception in favour of Money Bills is explained by the fact that Money Bills are dealt separately in section 1. It would make no sense for the section 2(1) procedure to be used in their case. This is not a matter that need concern the courts. The exception in favour of Bills extending the maximum duration of Parliament falls into a different category. The Act does not provide a separate procedure for use in their case. The effect of this exception is that Bills of this kind require the consent of both Houses before they can pass into law. It is hard to imagine that such a measure that had not been passed by the House of Lords would receive the Speaker's certificate, without which it could not be presented for the Royal Assent to Her Majesty. But if it did, I think that it is clear that the court would have jurisdiction to declare that it was not authorised by section 2(1). I am in full agreement with what my noble and learned friends, Lord Nicholls of Birkenhead, Lord Steyn and Baroness Hale of Richmond, have said on this issue.

**119** Beyond this point the argument that there are limits on what can be done under section 2(1) which are legal and not political runs into difficulty. I mention limits which are political here because, as Professor E C S Wade pointed out in his introduction to the 10th edition of Dicey, p xxvii, the Parliament Acts of 1911 and 1949 cannot be understood without reference to their political background. Lord Bingham has provided your Lordships with a valuable account of the constitutional background to the 1911 Act and its historical context, but for present purposes I would suggest that the political effects that resulted from what was done in 1911 and in 1949 are no less important. At p lxiii of his introduction Professor Wade said that the abdication of power—which is what the House of Lords agreed to in 1911—is at least as much a political as a legal event, and that it is only by accepting the political change which it has brought about that the courts can recognise the legality of the new situation.

**120** Professor Sir William Wade, too, observed that sovereignty is a political fact for which no purely legal authority can be constituted even though an Act of Parliament is passed for the very purpose of transferring sovereign power: "The Basis of Legal Sovereignty" [1955] CLJ 172, 196. The open texture of the foundations of our legal system which Professor H L A Hart discusses in ch VI of *The Concept of Law* (1961), especially at pp 107-114, defies precise analysis in strictly legal terms. More recently other commentators have asserted that the rule of parliamentary supremacy is ultimately based on political fact: Peter Mirfield, "Can the House of Lords Lawfully be Abolished?" (1979) 95 LQR 36, 42-44 and George Winterton, "Is the House of Lords Immortal?" (1979) 95 LQR 386, 388. It is sufficient to note at this stage that a conclusion that there are no legal limits to what can be done under section 2(1) does not mean that the power to legislate which it contains is without any limits whatever. Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognise it as law.

**121** The Attorney General was willing to accept that the words in parenthesis set limits to the use of the section 2(1) procedure, but he maintained that these express limitations did not harm his argument. Where limits were expressed, he said, there was no room for other limitations to be implied. If what has been done is legislation within the general scope of the words which give power to legislate, and it violates no express condition or restriction by which that power is limited, it is not for any court to inquire further or to enlarge these conditions or restrictions: per Lord Selborne, giving the judgment of the Board in *R v Burah* (1878) 3 App Cas 889, 905.

**122** There is obvious force in this argument, but I do not think that the matter is as clear cut as he suggested. I would not go so far as to say that the stated limitations rule out limitations which are unstated. If that was the case, there would be no answer to the most obvious abuse of section 2(1). This, as Lord Nicholls has pointed out, is a two-stage approach to extending the life of Parliament. First, a Bill would be introduced deleting the reference in that subsection to a Bill containing any provision to extend the life of Parliament. A Bill which sought to do this would not be within the terms of the prohibition. Then, a second Bill would be introduced, to run in tandem with the first, which sought to do what the provision which was to be deleted would have prohibited. So long as the first Bill passed into law before the second Bill was presented for the Royal Assent, so the argument would run, it could not be said to be a Bill that section 2(1) of the 1911 Act did not authorise. But I believe, in agreement with a majority of your Lordships, that such an obvious device to get round the express prohibition would be as vulnerable to a declaration of invalidity as a direct breach of it. In other words, there is an implied prohibition against the use of the section 2(1) procedure in such circumstances.

**123** If then there is room for an implied prohibition in that most extreme of circumstances, how much more room is there for other prohibitions to be implied? Sir Sydney's argument is that there is an implied prohibition against the use of the procedure to amend the conditions which section 2(1) laid down for its exercise. The whole subsection, he says, is conditional as it is introduced by the word "if", and it is subject to a proviso in which it is declared that its provisions shall not take effect unless two years have elapsed between the two dates to which it refers. He seeks further support for his argument from the long title and from this statement in the Preamble: "it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords." (His emphasis added.)

**124** These arguments are not unattractive and, like my noble and learned friend, Lord Carswell, I would have wished to examine them in more detail had it not been for the fact that they overlook the political reality of the situation in which Parliament now finds itself. Three Acts were passed by reference to the 1949 Act prior to the passing of the Hunting Act 2004. These are the War Crimes Act 1991 passed under a Conservative Government and the European Parliamentary Elections Act 1999 and the Sexual Offences (Amendment) Act 2000, both passed under a Labour Government. Each of the two main parties has made use of the 1949 Act's timetable, and in subsequent legislation passed by both Houses each of these Acts has been dealt with in a way that has acknowledged its validity. The War Crimes Act 1991 was amended by the Criminal Justice and Public Order Act 1994 and the Criminal Procedure and Investigations Act 1996. The European Parliamentary Elections Act 1999 was repealed by and consolidated in the European Parliamentary Elections Act 2002. And the Sexual Offences (Amendment) Act 2000 was amended by the Sexual Offences Act 2003. The political reality is that of a general acceptance by all the main parties and by both Houses of the amended timetable which the 1949 Act introduced. I do not think that it is open to a court of law to ignore that reality.

## **Conclusion**

**125** It is not easy to identify a legal principle which declares that, when the court is faced with a challenge to the 1949 Act on legal grounds, it must give way to the way Parliament itself has made use of, and accepted the use of, it. A lawyer would say that if the 1949 Act was not validly enacted nothing that has happened to it subsequently can cure the invalidity. That would, of course, be true if it was delegated or subordinate legislation, in the true sense of these words, that the court was faced with. But the 1949 Act proclaims itself to be, and appears on the Parliamentary Roll as, an Act of Parliament. Parliament was the author of the way the powers of the House of Lords were limited by the 1911 Act. So great weight must be attached to the way that Parliament itself has viewed the purported exercise of those powers when the 1949 Act was enacted. In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality Dicey, at p 3, likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has for the other. In *Pickin v British*

*Railways Board* [1974] AC 765, 788a-b Lord Reid observed that for a century or more both Parliament and the courts have been careful to act so as not to cause conflict between them. This is as much a prescription for the future as it was for the past.

**126** As Professor Hart, *The Concept of Law*, p 108, indicates, the categories which the law uses to identify what is law in these circumstances are too crude. There is a strong case for saying that the rule of recognition, which gives way to what people are prepared to recognise as law, is itself worth calling "law" and for applying it accordingly. It must never be forgotten that this rule, which is underpinned by what others have referred to as political reality, depends upon the legislature maintaining the trust of the electorate. In a democracy the need of the elected members to maintain this trust is a vitally important safeguard. The principle of parliamentary sovereignty which in the absence of higher authority, has been created by the common law is built upon the assumption that Parliament represents the people whom it exists to serve.

**127** Like others of your Lordships I am unable to accept the distinction which the Court of Appeal drew between what it described [2005] QB 579, para 71 as relatively modest changes and changes which it described in para 99 as of a fundamentally different nature. The wording of section 2(1) does not invite such a distinction. It raises questions of fact and degree about the effect of legislation which are quite unsuited for adjudication by a court. The argument that some provisions of the Acts of Union of 1707 are fundamental law as they were based on a treaty which preceded the creation of the United Kingdom Parliament is a different argument. Of course, as Dicey recognised, at p 79, the sovereignty of Parliament is limited by the possibility of popular resistance to its exercise. Trust will be eroded if the section 2(1) procedure is used to enact measures which are, as Lord Steyn puts it, exorbitant or are not proportionate. Nevertheless the final exercise of judgment on these matters must be left to the House of Commons as the elected chamber. It is for that chamber to decide where the balance lies when that procedure is being resorted to.

**128** But I agree with the Court of Appeal's conclusion in para 97 that the restrictions on the exercise of the power of the House of Lords that the 1949 Act purported to make have been so widely recognised and relied upon that these restrictions are, today, a political fact. It is no longer open to the courts, if it ever was, to say that that Act was not authorised by section 2(1) of the 1911 Act. I would dismiss the appeal.



## 11. *Partridge v. Crittenden* [1968] 1 WLR 1204: Divisional Court of the QBD

### Queen's Bench Division DC: Appeal by way of Case Stated

The appellant inserted an advertisement in a periodical, "Cage and Aviary Birds" for April 13, 1967, containing the words "Quality British A.B.C.R. ... brambling cocks, brambling hens ... 25s each," which appeared under the general heading "classified advertisements." In no place was there any direct use of the words "offers for sale." In answer to the advertisement, T. wrote, enclosing a cheque for 25s, and asked that a hen be sent to him. The hen arrived wearing a closed ring which could be removed without injury to the bird.

The appellant was charged with unlawfully offering for sale a brambling hen contrary to section 6 (1) of the Protection of Birds Act, 1954. The justices were of the opinion that the hen, being a bird included in schedule 4 to the Act of 1954, was not a closed-ringed specimen bred in captivity because it was possible to remove the ring, convicted him.

Protection of Birds Act, 1954, s. 6 (1): "If, save as may be authorised by a licence granted under section 10 of this Act, any person sells, offers for sale or has in his possession for sale -- (a) any live wild bird, being a bird included in schedule 4 to this Act of a species which is resident in or visits the British Isles in wild state, other than a close-ringed specimen bred in captivity ... he shall be guilty of an offence against this Act."

On appeal, the appellant contending that his advertisement was merely an invitation to treat and not an offer for sale, and that the mere fact that it was possible to remove the ring from the bird's leg did not mean that it was not of a closed-ring specimen:-

Held, allowing the appeal, that while "close-ringed" in section 6 (1) (a) of the Act meant ringed by a complete ring which was not capable of being forced apart or broken except by damaging it, so that the bird in question was not a closed-ring specimen; the advertisement inserted by the appellant under the title "classified advertisements" was not an offer for sale but merely an invitation to treat; and that, accordingly, the appellant was not guilty of the offence charged.

### ASHWORTH J.

This is an appeal by way of case stated from a decision of Chester justices. On July 19, 1967, they heard an information preferred by the prosecutor on behalf of the R.S.P.C.A. alleging against the appellant that he did unlawfully offer for sale a certain live wild bird, to wit a brambling, being a bird included in schedule 4 to the Protection of Birds Act, 1954, of a species which is resident in or visits the British Isles in a wild state, other than a close-ringed specimen bred in captivity, contrary to section 6, subsection (1) of the Act.

The case arose because in a periodical known as "Cage and Aviary Birds," the issue for April 13, 1967, there appeared an advertisement inserted by the appellant containing, inter alia, the words "Quality British A.B.C.R. ... brambling cocks, brambling hens, 25s each." In the case stated the full advertisement is not set out, but by the agreement of counsel this court has seen a copy of the issue in question, and what is perhaps to be noted in passing is that on the page there is a whole list of different birds under the general heading of "Classified Advertisements." In no place, so far as I can see, is there any direct use of the words "Offers for sale." I ought to say I am not for my part deciding that that would have the result of making this judgment any different, but at least it strengthens the case for the appellant that there is no such expression on the page. Having seen that advertisement, Mr. Thompson wrote to the appellant and asked for a hen and enclosed a cheque for 30s. A hen, according to the case, was sent to him on May 1, 1967, which was wearing a closed-ring, and he received it on May 2. The box was opened by Mr. Thompson in the presence of the prosecutor, and the case finds that Mr. Thompson was able to remove the ring without injury to the bird, and even taking into account that the bird had travelled from Leicester in a box on the

railway, its condition was rough, it was extremely nervous, it had no perching sense at all and its plumage was rough.

Stopping there, the inference from that finding is that the justices were taking the view, or could take the view, that from its appearance, at any rate, this was not such a bird as a person can legitimately sell within the Act of 1954. The case goes on to find: "The expression 'close-ringed' is nowhere defined nor is there any universally recommended size ring for a bramble finch.

"(g) The ring is placed on the bird's leg at the age of three to 10 days at which time it is not possible to determine what the eventual girth of the bird's leg will be."

Having been referred to the decision of this court in *Fisher v. Bell* the justices nonetheless took the view that the advertisement did constitute an offer for sale; they went on further to find that the bird was not a close-ringed specimen bred in captivity, because it was possible to remove the ring. Before this court Mr. Pitchers for the appellant, has taken two points, first, this was not an offer for sale and, secondly, that the justices' reason for finding that it was not a close-ringed bird was plainly wrong because the fact that one could remove the ring did not render it a non-close-ringed bird.

It is convenient, perhaps, to deal with the question of the ring first. For my part I confess I was in ignorance, and in some state of confusion, as to the real meaning and effect of this particular phrase in the section, and I express my indebtedness to Mr. Havers, for the prosecutor, for having made the matter, as far as I am concerned, perfectly clear. I would say if one was looking for a definition of the phrase "close-ringed" it means ringed by a complete ring, which is not capable of being forced apart or broken except, of course, with the intention of damaging it. I contrast a closed-ring of that sort -- it might take the form, I suppose, of an elastic band or of a metal circle ring -- with the type of ring which sometimes exists which is made into a ring when a tongue is placed through a slot and then drawn back; that is a ring which can be undone and is not close-ringed. In this case what is contemplated, according to Mr. Havers, and I accept it, is that with a young bird of this sort between three and ten days after hatching a closed-ring of the type described is forced over its claws, which are obviously brought together so as to admit the passage of the ring, and it is then permanently on or around the bird's leg, and as it grows, it would be impossible to take that ring off because the claws and the like would have rendered a repetition of the earlier manoeuvre impossible.

Therefore, approaching the matter this way, I can well understand how the justices came to the conclusion that this was not a close-ringed specimen, because they could take the ring off. If that were the only issue, I should not find any difficulty in upholding their decision. But the real point of substance in this case arose from the words "offer for sale," and it is to be noted in section 6 of the Act of 1954 that the operative words are "any person sells, offers for sale or has in his possession for sale." For some reason which Mr. Havers for the prosecutor has not been able to explain, those responsible for the prosecution in this case chose, out of the trio of possible offences, the one which could not succeed. There was a sale here, in my view, because Mr. Thompson sent his cheque and the bird was sent in reply; and a completed sale. On the evidence there was also a plain case of the appellant having in possession for sale this particular bird. But they chose to prosecute him for offering for sale, and they relied on the advertisement.

A similar point arose before this court in 1960 dealing, it is true, with a different statute but with the same words, in *Fisher v. Bell*. The relevant words of section 1 (1) of the Restriction of Offensive Weapons Act, 1959, in that case were: "Any person who ... offers for sale. ... (a) any knife. ..." Lord Parker C.J., in giving judgment said:

"The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale within the statute. I confess that I think that most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense. In

ordinary language it is there inviting people to buy it, and it is for sale; but any statute must of course be looked at in the light of the general law of the country."

The words are the same here "offer for sale," and in my judgment the law of the country is equally plain as it was in regard to articles in a shop window, namely that the insertion of an advertisement in the form adopted here under the title "Classified Advertisements" is simply an invitation to treat.

That is really sufficient to dispose of this case. I should perhaps in passing observe that the editors of the publication *Criminal Law Review* had an article dealing with *Fisher v. Bell* in which a way round that decision was at least contemplated, suggesting that while there might be one meaning of the phrase "offer for sale" in the law of contract, a criminal court might take a stricter view, particularly having in mind the purpose of the Act, in *Fisher v. Bell* the stocking of flick knives, and in this case the selling of wild birds. But for my part that is met entirely by the quotation which appears in Lord Parker's judgment in *Fisher v. Bell*, that "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation."

I would allow this appeal and quash the conviction.

**BLAIN J.**

I agree.

**LORD PARKER C.J.**

I agree and with less reluctance than in *Fisher v. Bell*, and *Mella v. Monahan* I say "with less reluctance" because I think when one is dealing with advertisements and circulars, unless they indeed come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale. In a very different context in *Grainger & Son v. Gough* Lord Herschell said dealing with a price-list:

"The transmission of such a price-list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited."

It seems to me accordingly that not only is it the law but common sense supports it.

**12. *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.* [1953] 1 QB 401: Court of Appeal (Criminal Division)**

The defendants' branch shop, consisting of a single room, was adapted to the "self-service" system. The room contained chemist's department, under the control of a registered pharmacist, in which various drugs and proprietary medicines included, or containing substances included, in Part I of the Poisons List compiled under section 17 (1) of the Pharmacy and Poisons Act, 1933, (but not in Sch. I to the Poisons Rules, 1949), were displayed on shelves in packages or other containers, with the price marked on each. A customer, on entering the shop, was provided with a wire basket, and having selected from the shelves the articles which he wished to buy, he put them in the basket and took them to the cashier's desk at one or other of the two exits, where the cashier stated the total price and received payment. That latter stage of every transaction involving the sale of a drug was supervised by the pharmacist in control of the department, who was authorized to prevent the removal of any drug from the premises.

In an action brought by the plaintiffs alleging an infringement by the defendants of section 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933, which requires the sale of poisons included in Part I of the Poisons List to be effected by or under the supervision of a registered pharmacist, it was held that the self-service system did not amount to an offer by the defendants to sell, but merely to an invitation to the customer to offer to buy; that such an offer was accepted at the cashier's desk under the supervision of the registered pharmacist; and that there was therefore no infringement of the section.

**JUDGMENT OF SOMERVELL L.J.**

This is an appeal from a decision of the Lord Chief Justice on an agreed statement of facts, raising a question under section 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933. The plaintiffs are the Pharmaceutical Society, incorporated by Royal charter. One of their duties is to take all reasonable steps to enforce the provisions of the Act. The provision in question is contained in section 18. [His Lordship read the section and stated the facts, and continued:] It is not disputed that in a chemist's shop where this self-service system does not prevail a customer may go in and ask a young woman assistant, who will not herself be a registered pharmacist, for one of these articles on the list, and the transaction may be completed and the article paid for, although the registered pharmacist, who will no doubt be on the premises, will not know anything himself of the transaction, unless the assistant serving the customer, or the customer, requires to put a question to him. It is right that I should emphasize, as did the Lord Chief Justice, that these are not dangerous drugs. They are substances which contain very small proportions of poison, and I imagine that many of them are the type of drug which has a warning as to what doses are to be taken. They are drugs which can be obtained, under the law, without a doctor's prescription.

The point taken by the plaintiffs is this: it is said that the purchase is complete if and when a customer going round the shelves takes an article and puts it in the receptacle which he or she is carrying, and that therefore, if that is right, when the customer comes to the pay desk, having completed the tour of the premises, the registered pharmacist, if so minded, has no power to say: "This drug ought not to be sold to this customer." Whether and in what circumstances he would have that power we need not inquire, but one can, of course, see that there is a difference if supervision can only be exercised at a time when the contract is completed.

I agree with the Lord Chief Justice in everything that he said, but I will put the matter shortly in my own words. Whether the view contended for by the plaintiffs is a right view depends on what are the legal implications of this layout - the invitation to the customer. Is a contract to be regarded as being completed when the article is put into the receptacle, or is this to be regarded as a more organized way of doing what is done already in many types of shops - and a bookseller is perhaps the best example - namely, enabling customers to have free access to what is in the shop, to look at the different articles, and then, ultimately, having got the ones which they wish to buy, to come up to the assistant saying "I want this"? The assistant in 999 times out of 1,000 says "That is all

right," and the money passes and the transaction is completed. I agree with what the Lord Chief Justice has said, and with the reasons which he has given for his conclusion, that in the case of an ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed. I can see no reason at all, that being clearly the normal position, for drawing any different implication as a result of this layout.

The Lord Chief Justice, I think, expressed one of the most formidable difficulties in the way of the plaintiffs' contention when he pointed out that, if the plaintiffs are right, once an article has been placed in the receptacle the customer himself is bound and would have no right, without paying for the first article, to substitute an article which he saw later of a similar kind and which he perhaps preferred. I can see no reason for implying from this self-service arrangement any implication other than that which the Lord Chief Justice found in it, namely, that it is a convenient method of enabling customers to see what there is and choose, and possibly put back and substitute, articles which they wish to have, and then to go up to the cashier and offer to buy what they have so far chosen. On that conclusion the case fails, because it is admitted that there was supervision in the sense required by the Act and at the appropriate moment of time.

For these reasons, in my opinion, the appeal should be dismissed.

### **JUDGMENT OF BIRKETT L.J.**

I am of the same opinion. The facts are clearly stated in the agreed statement of facts, and the argument on them has been very clearly stated by Mr. Lloyd-Jones. I think that clearest of all was the judgment of the Lord Chief Justice, with which I agree. In view of an observation which I made during the argument, I should like to add that under section 25 of the Pharmacy and Poisons Act, 1933, it is the duty of the Pharmaceutical Society of Great Britain, by means of inspection and otherwise, "to take all reasonable steps to enforce the provisions of Part I of this Act" - that really deals with the status of the registered pharmacist - "and to secure compliance by registered pharmacists and authorized sellers of poisons with the provisions of Part II of this Act." This action has been brought by the Pharmaceutical Society in pursuance of that duty which is laid upon them by statute, and the short point of the case is, at what point of time did the sale in this particular shop at Edgware take place? My Lord has explained the system which had been introduced into that shop in March of 1951. The two women customers in this case each took a particular package containing poison from the particular shelf, put it into her basket, came to the exit and there paid. It is said, on the one hand, that when the customer takes the package from the poison section and puts it into her basket the sale there and then takes place. On the other hand, it is said the sale does not take place until that customer, who has placed that package in the basket, comes to the exit.

The Lord Chief Justice dealt with the matter in this way, and I would like to adopt his words [FN5]: "It seems to me, therefore, that the transaction is in no way different from the normal transaction in a shop in which there is no self-service scheme. I am quite satisfied it would be wrong to say that the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that that person can insist on buying any article by saying 'I accept your offer.'" Then he went on to deal with the illustration of the bookshop, and continued: "Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price. The offer, the acceptance of the price, and therefore the sale take place under the supervision of the pharmacist. That is sufficient to satisfy the requirements of the section, for by using the words 'the sale is effected by, or under the supervision of, a registered pharmacist' the Act envisages that the sale may be effected by someone not a pharmacist. I think, too, that the sale is effected under his supervision if he is in a position to say 'You must not have that: that contains poison,' so that in any case, even if I were wrong in the view that I have taken on the question as to when the sale was completed, and

it was completed when the customer took the article from the shelf, it would still be effected under the supervision of the pharmacist within the meaning of section 18."

I agree with that, and I agree that this appeal ought to be dismissed.

#### **JUDGMENT OF ROMER L.J.**

I also agree. The Lord Chief Justice observed that, on the footing of the plaintiff society's contention, if a person picked up an article, once having picked it up, he would never be able to put it back and say that he had changed his mind. The shopkeeper would say: "No, the property has passed and you will have to pay." If that were the position in this and similar shops, and that position was known to the general public, I should imagine that the popularity of those shops would wane a good deal. In fact, I am satisfied that that is not the position, and that the articles, even though they are priced and put in shops like this, do not represent an offer by the shopkeeper which can be accepted merely by the picking up of the article in question. I quite agree with the reasons on which the Lord Chief Justice arrived at that conclusion and which Birkett L.J. has just referred to, and to those observations I can add nothing of my own. I agree that the appeal fails.

### 13. *Smith v. Hughes* [1960] 1 WLR 830: Divisional Court of the QBD

Queen's Bench Division

*Smith v. Hughes*

*Same v. Caiels*

*Tolan v. Hughes*

*Same v. Caiels*

*Same v. Thomas*

*Same v. Mackinnon*

Vagrancy--Prostitution--"In a street"--Soliciting from house, men passing in street--Whether soliciting "in a street"--Street Offences Act, 1959 (7 & 8 Eliz. 2, c. 57), s. 1 (1).

Two common prostitutes, standing on a balcony or behind windows in their house, severally solicited men passing in the street by tapping on the balcony rail or window pane, attracting their attention and inviting them into the house. Informations were preferred against each prostitute charging that she, being a common prostitute, did solicit in a street for the purpose of prostitution contrary to section 1 (1) of the Street Offences Act, 1959.: **"It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution."**

The prostitutes were convicted. On appeal:

*Held*, dismissing the appeals, that on the true construction of section 1 (1), taking into consideration the mischief at which the Act of 1959 was aimed, it mattered not where a prostitute stood (whether on a balcony, or in a room behind a closed, or open, or half-open window), if her solicitation was projected to and addressed to somebody walking in the street, she was guilty of an offence against section 1 (1).

Police officers preferred two informations against Marie Theresa Smith and four informations against Christine Tolan alleging that on various dates, they, being common prostitutes, did solicit in a street for the purpose of prostitution contrary to section 1 (1) of the Street Offences Act, 1959.

The magistrate found the following facts in relation to the first information against Smith. The defendant was a common prostitute who lived at No. 39 Curzon Street, London, W., and used the premises for the purposes of prostitution. On November 4, 1959, between 8.50 p.m. and 9.05 p.m. the defendant solicited men passing in the street, for the purposes of prostitution, from a first-floor balcony of No. 39 Curzon Street (the balcony being some 8-10 feet above street level). The defendant's method of soliciting the men was (i) to attract their attention to her by tapping on the balcony railing with some metal object and by hissing at them as they passed in the street beneath her and (ii) having so attracted their attention, to talk with them and invite them to come inside the premises with such words as "Would you like to come up here a little while?" at the same time as she indicated the correct door of the premises.

It was contended on behalf of the defendant, *inter alia*, that the balcony was not "in a street" within the meaning of section 1(1) of the Street Offences Act, 1959, and that accordingly no offence had been committed.

It was contended on behalf of the prosecutor, *inter alia*, that the soliciting had taken place "in a street" within the meaning of section 1(1).

The magistrate was of opinion that the soliciting had taken place "in a street" within the meaning of section 1 (1), and, accordingly, convicted the defendant and fined her £5 and 5 guineas costs.

On the second information against Smith the magistrate found, *inter alia*, that on January 9, 1960, between 12.40 a.m. and 1.0 a.m. the defendant solicited men passing in the street for the

purposes of prostitution from a closed ground-floor window of No. 39 Curzon Street (the window being some 3 feet from some 4 feet high railings which bounded the pavement on the side of the premises). The defendant's method of soliciting the men was (i) to attract their attention to her by tapping on the window pane with some metal object as they passed in the street in front of her and (ii) having so attracted their attention, to invite them in for a price which she indicated by extending three fingers of her hand and indicating the correct door of the premises.

On one occasion the price so indicated by the defendant was agreed and the man entered the premises, leaving some 15 minutes later.

On another occasion, the price so indicated by the defendant was not agreed by the man concerned who, in his turn, made a counter-proposal as to price by extending two fingers of his hand. That counter-proposal was not accepted by the defendant and that man walked away.

In that case the magistrate came to the same conclusion, convicted and fined the defendant £5.

In the four informations preferred against Tolan the magistrate found similar facts. In the first one Tolan was found to be soliciting men from a half-open ground-floor window; in the second from a partly-open first-floor window, in the third and fourth from a closed ground-floor window.

The magistrate found all the offences proved, in the first case he fined her £5 with five guineas costs, in the second £10, in the third £10 and in the fourth £5.

The defendants appealed in each case.

#### **LORD PARKER C.J.**

These are six appeals by way of case stated by one of the stipendiary magistrates sitting at Bow Street, before whom informations were preferred by police officers against the defendants, in each case that she **"being a common prostitute, did solicit in a street for the purpose of prostitution, contrary to section 1 (1) of the Street Offences Act, 1959."** The magistrate in each case found that the defendant was a common prostitute, that she had solicited and that the solicitation was in a street, and in each case fined the defendant.

The facts, to all intents and purposes, raise the same point in each case; there are minute differences. The defendants in each case were not themselves physically in the street but were in a house adjoining the street. In one case the defendant was on a balcony and she attracted the attention of men in the street by tapping and calling down to them. In other cases the defendants were in ground-floor windows, either closed or half open, and in another case in a first-floor window.

The sole question here is whether in those circumstances each defendant was soliciting in a street or public place. The words of section 1(1) of the Act of 1959 are in this form: "It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution." Observe that it does not say there specifically that the person who is doing the soliciting must be in the street. Equally, it does not say that it is enough if the person who receives the solicitation or to whom it is addressed is in the street. For my part, I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether the window is shut or open or half open; in each case her solicitation is projected to and addressed to somebody walking in the street. For my part, I am content to base my decision on that ground and that ground alone. I think the magistrate came to a correct conclusion in each case, and that these appeals should be dismissed.



**HILBERY J.**

I agree. 39 Curzon Street, from the papers in front of us, appears to be let to prostitutes who practise their profession from that address, and the way of practising it is shown by the cases stated, as my Lord has said, and in one case by tapping on the window pane with some metal object as men passed by in the street in front of her, and then openly inviting them into her room. In the other cases it was done by tapping on the windows of various rooms occupied by these prostitutes and then, if the window was open, giving invitations by way of solicitation or signals representing solicitation. In each case signals were intended to solicit men passing by in the street. They did effect solicitation of the men when they reached those men. At that moment the person in the street to whom the signal was addressed was solicited and, being solicited in the street, I agree with the conclusion of my Lord and for these reasons I have intimated I agree that these appeals must be dismissed.

#### 14. **Whiteley v. Chappell (1868-69) LR 4 QB 147**

Lush, Hannen and Hayes, JJ.: 1868 Nov. 28

*Personation at Election of Guardians of the Poor*—"Person entitled to Vote"—14 & 15 Vict. c. 105, s. 3.

A man cannot be convicted, under 14 & 15 Vict. c. 105, s. 3, of personating "a person entitled to vote" at an election of guardians of the poor, if the person personated be dead at the time.

CASE stated by the stipendiary magistrate of Manchester, under 20 & 21 Vict. c. 43.

The following is the substance of the case:—

By 14 & 15 Vict. c. 105, s. 3, if any person, pending or after the election of any guardian [of the poor], shall wilfully, fraudulently, and with intent to affect the result of such election ... "personate any person entitled to vote at such election," he is made liable on conviction to imprisonment for not exceeding three months.

The appellant was charged with having personated one J. Marston, a person entitled to vote at an election of guardians for the township of Bradford; and it was proved that Marston was duly qualified as a ratepayer on the rate book to have voted at the election, but that he had died before the election. The appellant delivered to the The person appointed to collect the voting papers a voting paper apparently duly signed by Marston. magistrate convicted the appellant.

The question for the Court was, whether the appellant was rightly convicted.

**Mellish, Q.C.** (with him **McIntyre** ), for the appellant. A dead person cannot be said to be "a person entitled to vote;" and the appellant therefore could not be guilty of personation under 14 & 15 Vict. c. 105, s. 3. Very possibly he was within the spirit, but he was not within the letter, of the enactment, and in order to bring a person within a penal enactment, both must concur. In Russell on Crimes (vol. ii. p. 1013, 4th ed., p. 541, 3rd ed.), under a former statute, in which the words were similar to those of 2 Wm. 4, c. 53, s. 49, which makes it a misdemeanor to personate "a person entitled or supposed to be entitled to any prize money," &c., Brown's Case<sup>1</sup> is cited, in which it was held that the personation must be of some person *primâ facie* entitled to prize money. In the Parliamentary Registration Act (6 Vict. c. 18), s. 83, the words are "any person who shall knowingly personate ... any person whose name appears on the register of voters, whether such person be alive or dead;" but under the present enactment the person must be entitled, that is, could have voted himself.

**Crompton**, for the respondent. Brown's Case<sup>2</sup> is, in effect, overruled by the later cases of Rex v. Martin, and Rex v. Cramp<sup>3</sup>, in which the judges decided that the offence of personating a person "supposed to be entitled" could be committed, although the person, to the knowledge or belief of the authorities, was dead. Those cases are directly in point. The gist of the offence is the fraudulently voting under another's name; the mischief is the same, whether the supposed voter be alive or dead; and the Court will put a liberal construction on such an enactment: Reg. v. Hague.<sup>4</sup>

**Mellish, Q.C.** , in reply. "Supposed to be entitled" must have been held by the judges in the cases cited to mean supposed by the person personating.

**LUSH J.**

I do not think we can, without straining them, bring the case within the words of the enactment. The legislature has not used words wide enough to make the personation of a dead person an offence. The words "a person entitled to vote" can only mean, without a forced construction, a person who is entitled to vote at the time at which the personation takes place; in the present case, therefore, I feel bound to say the offence has not been committed. In the cases of *Rex v. Martin*, and *Rex v. Cramp*<sup>5</sup>, the judges gave no reasons for their decision; they probably held that "supposed to be entitled" meant supposed by the person personating.

**HANNEN J.**

I regret that we are obliged to come to the conclusion that the offence charged was not proved; but it would be wrong to strain words to meet the justice of the present case, because it might make a precedent, and lead to dangerous consequences in other cases.

## **15.    *The Noise Act 1996 (as amended)***

# **Noise Act 1996**

## **1996 CHAPTER 37**

An Act to make provision about noise emitted from dwellings at night; about the forfeiture and confiscation of equipment used to make noise unlawfully; and for connected purposes. [18th July 1996]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

### **1 Application of sections 2 to 9**

Sections 2 to 9 apply to the area of every local authority in England and Wales.

### **2 Investigation of complaints of noise at night**

**(1)** A local authority in England and Wales may, if they receive a complaint of the kind mentioned in subsection (2), arrange for an officer of the authority to take reasonable steps to investigate the complaint.

**(2)** The kind of complaint referred to is one made by any individual present in a dwelling during night hours (referred to in this Act as “the complainant’s dwelling”) that excessive noise is being emitted from

(a) another dwelling (referred to in this group of sections as “the offending dwelling”), or

(b) any premises in respect of which a premises licence or a temporary event notice has effect (referred to in this group of sections as “the offending premises”).

(i) any premises in relation to which an exhibition licence has effect;

(ii) any place in relation to which an entertainment licence has effect;

(iii) any licensed premises;

(iv) a place at which the sale of intoxicating liquor is for the time being authorised by an occasional licence;

(v) any premises where meals or refreshments are supplied whether for consumption on or off the premises;

(vi) any premises occupied by a registered club.”

**(3)** A complaint under subsection (2) may be made by any means.

**(4)** If an officer of the authority is satisfied, in consequence of an investigation under subsection (1), that—

(a) noise is being emitted from the offending dwelling or the offending premises during night hours, and

(b) the noise, if it were measured from within the complainant’s dwelling, would or might exceed the permitted level, he may serve a notice about the noise under section 3.

**(5)** For the purposes of subsection (4), it is for the officer of the authority dealing with the particular case—

(a) to decide whether any noise, if it were measured from within the complainant’s dwelling, would or might exceed the permitted level, and

(b) for the purposes of that decision, to decide whether to assess the noise from within or outside the complainant's dwelling and whether or not to use any device for measuring the noise.

**(6)** In this group of sections, "night hours" means the period beginning with 11 p.m. and ending with the following 7 a.m.

**(7)** Where a local authority receives a complaint under subsection (2) and the offending dwelling is, or the offending premises are, within the area of another local authority, the first local authority may act under this group of sections as if the offending dwelling or the offending premises were within their area,

**(7A)** In this group of sections—

"premises licence" has the same meaning as in the Licensing Act 2003 (c. 17);

"temporary event notice" has the same meaning as in the Licensing Act 2003 (and is to be treated as having effect in accordance with section 171(6) of that Act).

**(8)** In this section and sections 3 to 9, "this group of sections" means this and those sections.

### **3 Warning notices**

**(1)** A notice under this section (referred to in this Act as "a warning notice") must—

(a) state that an officer of the authority considers—

(i) that noise is being emitted from the offending dwelling or the offending premises during night hours, and

(ii) that the noise exceeds, or may exceed, the permitted level, as measured from within the complainant's dwelling, and

(b) give warning—

(i) in a case where the complaint is in respect of a dwelling, that any person who is responsible for noise which is emitted from the offending dwelling in the period specified in the notice and which exceeds the permitted level, as measured from within the complainant's dwelling, may be guilty of an offence;

(ii) in a case where the complaint is in respect of other premises, that the responsible person in relation to the offending premises may be guilty of an offence if noise which exceeds the permitted level, as measured from within the complainant's dwelling, is emitted from the premises in the period specified in the notice.

**(2)** The period specified in a warning notice must be a period—

(a) beginning not earlier than ten minutes after the time when the notice is served, and

(b) ending with the following 7 a.m.

**(3)** In a case where the complaint is in respect of a dwelling, a warning notice must be served—

(a) by delivering it to any person present at or near the offending dwelling and appearing to the officer of the authority to be responsible for the noise, or

(b) if it is not reasonably practicable to identify any person present at or near the dwelling as being a person responsible for the noise on whom the notice may reasonably be served, by leaving it at the offending dwelling.

**(3A)** In a case where the complaint is in respect of other premises, a warning notice must be served by delivering it to the person who appears to the officer of the authority to be the responsible person in relation to the offending premises at the time the notice is delivered.

**(4)** A warning notice must state the time at which it is served.

**(5)** For the purposes of this group of sections, a person is responsible for noise emitted from a dwelling if he is a person to whose act, default or sufferance the emission of the noise is wholly or partly attributable.

**(6)** For the purposes of this group of sections, the responsible person in relation to premises at a particular time is—

(a) where a premises licence has effect in respect of the premises—

(i) the person who holds the premises licence if he is present at the premises at that time,

(ii) where that person is not present at the premises at that time, the designated premises supervisor under the licence if he is present at the premises at that time, or

(iii) where neither of the persons mentioned in sub-paragraphs (i) and (ii) is present at the premises at that time, any other person present at the premises at that time who is in charge of the premises;

(b) where a temporary event notice has effect in respect of the premises—

(i) the premises user in relation to that notice if he is present at the premises at that time, or

(ii) where the premises user is not present at the premises at that time, any other person present at the premises at that time who is in charge of the premises.

#### **4 Offence where noise from a dwelling exceeds permitted level after service of notice**

**(1)** If a warning notice has been served in respect of noise emitted from a dwelling, any person who is responsible for noise which—

(a) is emitted from the dwelling in the period specified in the notice, and

(b) exceeds the permitted level, as measured from within the complainant's dwelling, is guilty of an offence.

**(2)** It is a defence for a person charged with an offence under this section to show that there was a reasonable excuse for the act, default or sufferance in question.

**(3)** A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

#### **4A Offence where noise from other premises exceeds permitted level after service of notice**

**(1)** If—

(a) a warning notice has been served under section 3 in respect of noise emitted from premises,

(b) noise is emitted from the premises in the period specified in the notice, and

(c) the noise exceeds the permitted level, as measured from within the complainant's dwelling,

the responsible person in relation to the offending premises at the time at which the noise referred to in paragraph

(c) is emitted is guilty of an offence.

**(2)** A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

## **5 Permitted level of noise**

- (1) For the purposes of this group of sections the Secretary of State may by directions in writing determine the maximum level of noise (referred to in this group of sections as “the permitted level”) which may be emitted during night hours from any dwelling or other premises.
- (2) The permitted level is to be a level applicable to noise as measured from within any other dwelling in the vicinity by an approved device used in accordance with any conditions subject to which the approval was given.
- (3) Different permitted levels may be determined for different circumstances, and the permitted level may be determined partly by reference to other levels of noise.
- (4) The Secretary of State may from time to time vary his directions under this section by further directions in writing.

## **6 Approval of measuring devices**

- (1) For the purposes of this group of sections, the Secretary of State may approve in writing any type of device used for the measurement of noise; and references in this group of sections to approved devices are to devices of a type so approved.
- (2) Any such approval may be given subject to conditions as to the purposes for which, and the manner and other circumstances in which, devices of the type concerned are to be used.
- (3) In proceedings for an offence under section 4 or 4A, a measurement of noise made by a device is not admissible as evidence of the level of noise unless it is an approved device and any conditions subject to which the approval was given are satisfied.

## **7 Evidence**

- (1) In proceedings for an offence under section 4 or 4A, evidence—
- (a) of a measurement of noise made by a device, or of the circumstances in which it was made, or
  - (b) that a device was of a type approved for the purposes of section 6, or that any conditions subject to which the approval was given were satisfied,
- may be given by the production of a document mentioned in subsection (2).
- (2) The document referred to is one which is signed by an officer of the local authority and which (as the case may be)—
- (a) gives particulars of the measurement or of the circumstances in which it was made, or
  - (b) states that the device was of such a type or that, to the best of the knowledge and belief of the person making the statement, all such conditions were satisfied;
- and if the document contains evidence of a measurement of noise it may consist partly of a record of the measurement produced automatically by a device.
- (3) In proceedings for an offence under section 4, evidence that noise, or noise of any kind, measured by a device at any time was noise emitted from a dwelling may be given by the production of a document—
- (a) signed by an officer of the local authority, and

(b) stating that he had identified that dwelling as the source at that time of the noise or, as the case may be, the noise of that kind.

**(3A)** In proceedings for an offence under section 4A, evidence that noise, or noise of any kind, measured by a device at any time was noise emitted from any other premises may be given by the production of a document—

(a) signed by an officer of the local authority, and

(b) stating that he had identified those premises as the source at that time of the noise or, as the case may be, noise of that kind.

**(4)** For the purposes of this section, a document purporting to be signed as mentioned in subsection (2), (3)(a) or (3A)(a) is to be treated as being so signed unless the contrary is proved.

**(5)** This section does not make a document admissible as evidence in proceedings for an offence unless a copy of it has, not less than seven days before the hearing or trial, been served on the person charged with the offence.

**(6)** This section does not make a document admissible as evidence of anything other than the matters shown on a record produced automatically by a device if, not less than three days before the hearing or trial or within such further time as the court may in special circumstances allow, the person charged with the offence serves a notice on the prosecutor requiring attendance at the hearing or trial of the person who signed the document.

## **8 Fixed penalty notices.**

**(1)** Where an officer of a local authority who is authorised for the purposes of this section has reason to believe that a person is committing or has just committed an offence under section 4 or 4A, he may give that person a notice (referred to in this Act as a “fixed penalty notice”) offering him the opportunity of discharging any liability to conviction for that offence by payment of a fixed penalty.

**(2)** A fixed penalty notice may be given to a person—

(a) by delivering the notice to him, or

(b) if it is not reasonably practicable to deliver it to him, by leaving the notice, addressed to him, at the offending dwelling or the offending premises (as the case may be).

**(3)** Where a person is given a fixed penalty notice in respect of such an offence—

(a) proceedings for that offence must not be instituted before the end of the period of fourteen days following the date of the notice, and

(b) he cannot be convicted of that offence if he pays the fixed penalty before the end of that period.

**(4)** A fixed penalty notice must give such particulars of the circumstances alleged to constitute the offence as are necessary for giving reasonable information of the offence.

**(5)** A fixed penalty notice must state—

(a) the period during which, because of subsection (3)(a), proceedings will not be taken for the offence,

(b) the amount of the fixed penalty, and

(c) the person to whom and the address at which the fixed penalty may be paid.

**(6)** Payment of the fixed penalty may (among other methods) be made by pre-paying and posting to that person at that address a letter containing the amount of the penalty (in cash or otherwise).



(7) Where a letter containing the amount of the penalty is sent in accordance with subsection (6), payment is to be regarded as having been made at the time at which that letter would be delivered in the ordinary course of post.

#### **8A Amount of fixed penalty**

(1) This section applies in relation to a fixed penalty payable to a local authority in pursuance of a notice under section 8.

(2) In the case of an offence under section 4, the amount of the fixed penalty—

(a) is the amount specified by the local authority in relation to the authority's area, or

(b) if no amount is so specified, is £100.

(2A) In the case of an offence under section 4A the amount of the fixed penalty is £500.

(3) The local authority may make provision for treating the fixed penalty payable in the case of an offence under section 4 as having been paid if a lesser amount is paid before the end of a period specified by the authority.

(4) The appropriate person may by regulations make provision in connection with the powers conferred on local authorities under subsections (2)(a) and (3).

(5) Regulations under subsection (4) may (in particular)—

(a) require an amount specified under subsection (2)(a) to fall within a range prescribed in the regulations;

(b) restrict the extent to which, and the circumstances in which, a local authority can make provision under subsection (3).

(6) The appropriate person may by order substitute a different amount for the amount for the time being specified in subsection (2)(b) or (2A).

#### **8B Fixed penalty notices: power to require name and address**

(1) If an officer of a local authority who is authorised for the purposes of section 8 proposes to give a person a fixed penalty notice, the officer may require the person to give him his name and address.

(2) A person commits an offence if—

(a) he fails to give his name and address when required to do so under subsection (1), or

(b) he gives a false or inaccurate name or address in response to a requirement under that subsection.

(3) A person guilty of an offence under subsection (2) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

#### **9 Section 8: supplementary.**

(1) If a form for a fixed penalty notice is specified in an order made by the appropriate person, a fixed penalty notice must be in that form.

(2) If a fixed penalty notice is given to a person in respect of noise emitted from a dwelling in any period specified in a warning notice—

(a) no further fixed penalty notice may be given to that person in respect of noise emitted from the dwelling during that period, but

(b) that person may be convicted of a further offence under section 4 in respect of noise emitted from the dwelling after the fixed penalty notice is given and before the end of that period.

**(2A)** If a fixed penalty notice is given to a person in respect of noise emitted from other premises in any period in a warning notice—

(a) no further fixed penalty notice may be given to that person in respect of noise emitted from the premises during that period, but

(b) that person may be convicted of a further offence under section 4A in respect of noise emitted from the premises after the fixed penalty notice is given and before the end of that period.

**(3)** [Repealed]

**(4)** A local authority may use any sums it receives under section 8 (its “penalty receipts”) only for the purposes of functions of its that are qualifying functions.

**(4A)** The following are qualifying functions for the purposes of this section—

(a) functions under this Act,

(b) functions of a description specified in regulations made by the appropriate person.

**(4B)** Regulations under subsection (4A)(b) may (in particular) have the effect that a local authority may use its penalty receipts for the purposes of any of its functions.

**(4C)** A local authority must supply the appropriate person with such information relating to the use of its penalty receipts as the appropriate person may require.

**(4D)** The appropriate person may by regulations—

(a) make provision for what a local authority is to do with its penalty receipts—

(i) pending their being used for the purposes of qualifying functions of the authority;

(ii) if they are not so used before such time after their receipt as may be specified by the regulations;

(b) make provision for accounting arrangements in respect of a local authority’s penalty receipts.

**(4E)** The provision that may be made under subsection (4D)(a)(ii) includes (in particular) provision for the payment of sums to a person (including the appropriate person) other than the local authority.

**(4F)** Before making regulations under this section, the appropriate person must consult—

(a) the local authorities to which the regulations are to apply, and

(b) such other persons as the appropriate person considers appropriate.

**(4G)** The powers to make regulations conferred by this section are, for the purposes of subsection (1) of section 100 of the Local Government Act 2003, to be regarded as included among the powers mentioned in subsection (2) of that section.

**(4H)** Regulations under this section relating to local authorities in England may—

(a) make provision in relation to—

(i) all local authorities,

(ii) particular local authorities, or

(iii) particular descriptions of local authority;

(b) make different provision in relation to different local authorities or descriptions of local authority.

(5) In proceedings for an offence under section 4 or 4A, evidence that payment of a fixed penalty was or was not made before the end of any period may be given by the production of a certificate which—

(a) purports to be signed by or on behalf of the person having responsibility for the financial affairs of the local authority, and

(b) states that payment of a fixed penalty was made on any date or, as the case may be, was not received before the end of that period.

***Seizure, etc. of equipment used to make noise unlawfully***

**10 Powers of entry and seizure etc.**

(1) The power conferred by subsection (2) may be exercised where an officer of a local authority has reason to believe that—

(a) a warning notice has been served in respect of noise emitted from a dwelling or other premises, and

(b) at any time in the period specified in the notice, noise emitted from the dwelling or other premises has exceeded the permitted level, as measured from within the complainant's dwelling.

(2) An officer of the local authority, or a person authorised by the authority for the purpose, may enter the dwelling or other premises from which the noise in question is being or has been emitted and may seize and remove any equipment which it appears to him is being or has been used in the emission of the noise.

(3) A person exercising the power conferred by subsection (2) must produce his authority, if he is required to do so.

(4) If it is shown to a justice of the peace on sworn information in writing that—

(a) a warning notice has been served in respect of noise emitted from a dwelling or other premises,

(b) at any time in the period specified in the notice, noise emitted from the dwelling or other premises has exceeded the permitted level, as measured from within the complainant's dwelling, and

(c) entry of an officer of the local authority, or of a person authorised by the authority for the purpose, to the dwelling or other premises has been refused, or such a refusal is apprehended, or a request by an officer of the authority, or of such a person, for admission would defeat the object of the entry, the justice may by warrant under his hand authorise the local authority, by any of their officers or any person authorised by them for the purpose, to enter the dwelling or other premises, if need be by force.

(5) A person who enters any dwelling or other premises under subsection (2), or by virtue of a warrant issued under subsection (4), may take with him such other persons and such equipment as may be necessary; and if, when he leaves, the dwelling is, or the other premises are, unoccupied, must leave it or them as effectively secured against trespassers as he found it or them.

(6) A warrant issued under subsection (4) continues in force until the purpose for which the entry is required has been satisfied.

(7) The power of a local authority under section 81(3) of the Environmental Protection Act 1990 to abate any matter, where that matter is a statutory nuisance by virtue of section 79(1)(g) of that Act (noise emitted from premises so as to be prejudicial to health or a nuisance), includes power to seize and remove any equipment which it appears to the authority is being or has been used in the emission of the noise in question.

**(8)** A person who wilfully obstructs any person exercising any powers conferred under subsection (2) or by virtue of subsection (7) is liable, on summary conviction, to a fine not exceeding level 3 on the standard scale.

**(9)** The Schedule to this Act (which makes further provision in relation to anything seized and removed by virtue of this section) has effect.

## **General**

### **11 Interpretation and subordinate legislation.**

**(1)** In this Act, “local authority” means—

(a) in Greater London, a London borough council, the Common Council of the City of London and, as respects the Temples, the Sub-Treasurer of the Inner Temple and the Under-Treasurer of the Middle Temple respectively,

(b) outside Greater London—

(i) any district council,

(ii) the council of any county so far as they are the council for any area for which there are no district councils,

(iii) in Wales, the council of a county borough, and

(c) the Council of the Isles of Scilly.

**(2)** In this Act—

(a) “dwelling” means any building, or part of a building, used or intended to be used as a dwelling,

(b) references to noise emitted from a dwelling include noise emitted from any garden, yard, outhouse or other appurtenance belonging to or enjoyed with the dwelling.

**(2A)** In this Act “appropriate person” means—

(a) the Secretary of State, in relation to England;

(b) the National Assembly for Wales, in relation to Wales.

**(3)** The power to make an order or regulations under this Act is exercisable by statutory instrument which (except in the case of an order or regulations under section 8A(7) or 14 or an order or regulations made solely by the National Assembly for Wales) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

**(4)** An order under section 8A(7) shall not be made unless a draft of the order has been laid before, and approved by a resolution of, the Assembly.

### **12 Protection from personal liability.**

**(1)** A member of a local authority or an officer or other person authorised by a local authority is not personally liable in respect of any act done by him or by the local authority or any such person if the act was done in good faith for the purpose of executing powers conferred by, or by virtue, of this Act.

### **13 Expenses.**

There is to be paid out of money provided by Parliament any increase attributable to this Act in the sums payable out of money so provided under any other enactment.

#### **14 Short title, commencement and extent.**

**(1)** This Act may be cited as the Noise Act 1996.

**(2)** This Act is to come into force on such day as the Secretary of State may by order appoint, and different days may be appointed for different purposes.

**(3)** This Act does not extend to Scotland.

### **SCHEDULE**

#### **POWERS IN RELATION TO SEIZED EQUIPMENT**

##### ***Introductory***

**1** In this Schedule—

(a) a “noise offence” means—

(i) in relation to equipment seized under section 10(2) of this Act, an offence under section 4 or 4A of this Act, and

(ii) in relation to equipment seized under section 81(3) of the Environmental Protection Act 1990 (as extended by section 10(7) of this Act), an offence under section 80(4) of that Act in respect of a statutory nuisance falling within section 79(1)(g) of that Act,

(b) “seized equipment” means equipment seized in the exercise of the power of seizure and removal conferred by section 10(2) of this Act or section 81(3) of the Environmental Protection Act 1990 (as so extended),

(c) “related equipment”, in relation to any conviction of or proceedings for a noise offence, means seized equipment used or alleged to have been used in the commission of the offence,

(d) “responsible local authority”, in relation to seized equipment, means the local authority by or on whose behalf the equipment was seized.

##### ***Retention***

**2(1)** Any seized equipment may be retained—

(a) during the period of twenty-eight days beginning with the seizure, or

(b) if it is related equipment in proceedings for a noise offence instituted within that period against any person, until—

(i) he is sentenced or otherwise dealt with for the offence or acquitted of the offence, or

(ii) the proceedings are discontinued.

**2(2)** Sub-paragraph (1) does not authorise the retention of seized equipment if—

(a) a person has been given a fixed penalty notice under section 8 of this Act in respect of any noise,

(b) the equipment was seized because of its use in the emission of the noise in respect of which the fixed penalty notice was given, and

(c) that person has paid the fixed penalty before the end of the period allowed for its payment.

## ***Forfeiture***

**3(1)** Where a person is convicted of a noise offence the court may make an order (“a forfeiture order”) for forfeiture of any related equipment.

**3(2)** The court may make a forfeiture order whether or not it also deals with the offender in respect of the offence in any other way and without regard to any restrictions on forfeiture in any enactment.

**3(3)** In considering whether to make a forfeiture order in respect of any equipment a court must have regard—

(a) to the value of the equipment, and

(b) to the likely financial and other effects on the offender of the making of the order (taken together with any other order that the court contemplates making).

**3(4)** A forfeiture order operates to deprive the offender of any rights in the equipment to which it relates.

## ***Consequences of forfeiture***

**4(1)** Where any equipment has been forfeited under paragraph 3, a magistrates’ court may, on application by a claimant of the equipment (other than the person in whose case the forfeiture order was made) make an order for delivery of the equipment to the applicant if it appears to the court that he is the owner of the equipment.

**4(2)** No application may be made under sub-paragraph (1) by any claimant of the equipment after the expiry of the period of six months beginning with the date on which a forfeiture order was made in respect of the equipment.

**4(3)** Such an application cannot succeed unless the claimant satisfies the court—

(a) that he had not consented to the offender having possession of the equipment, or

(b) that he did not know, and had no reason to suspect, that the equipment was likely to be used in the commission of a noise offence.

**4(4)** Where the responsible local authority is of the opinion that the person in whose case the forfeiture order was made is not the owner of the equipment, it must take reasonable steps to bring to the attention of persons who may be entitled to do so their right to make an application under sub-paragraph (1).

**4(5)** An order under sub-paragraph (1) does not affect the right of any person to take, within the period of six months beginning with the date of the order, proceedings for the recovery of the equipment from the person in possession of it in pursuance of the order, but the right ceases on the expiry of that period.

**4(6)** If on the expiry of the period of six months beginning with the date on which a forfeiture order was made in respect of the equipment no order has been made under sub-paragraph (1), the responsible local authority may dispose of the equipment.

## ***Return etc. of seized equipment***

**5** If in proceedings for a noise offence no order for forfeiture of related equipment is made, the court (whether or not a person is convicted of the offence) may give such directions as to the return, retention or disposal of the equipment by the responsible local authority as it thinks fit.

**6(1)** Where in the case of any seized equipment no proceedings in which it is related equipment are begun within the period mentioned in paragraph 2(1)(a)—

(a) the responsible local authority must return the equipment to any person who—

(i) appears to them to be the owner of the equipment, and

(ii) makes a claim for the return of the equipment within the period mentioned in sub-paragraph (2), and

(b) if no such person makes such a claim within that period, the responsible local authority may dispose of the equipment.

**6(2)** The period referred to in sub-paragraph (1)(a)(ii) is the period of six months beginning with the expiry of the period mentioned in paragraph 2(1)(a).

**6(3)** The responsible local authority must take reasonable steps to bring to the attention of persons who may be entitled to do so their right to make such a claim.

**6(4)** Subject to sub-paragraph (6), the responsible local authority is not required to return any seized equipment under sub-paragraph (1)(a) until the person making the claim has paid any such reasonable charges for the seizure, removal and retention of the equipment as the authority may demand.

**6(5)** If—

(a) equipment is sold in pursuance of—

(i) paragraph 4(6),

(ii) directions under paragraph 5, or

(iii) this paragraph, and

(b) before the expiration of the period of one year beginning with the date on which the equipment is sold any person satisfies the responsible local authority that at the time of its sale he was the owner of the equipment, the authority is to pay him any sum by which any proceeds of sale exceed any such reasonable charges for the seizure, removal or retention of the equipment as the authority may demand.

**6(6)** The responsible local authority cannot demand charges from any person under sub-paragraph (4) or (5) who they are satisfied did not know, and had no reason to suspect, that the equipment was likely to be used in the emission of noise exceeding the level determined under section 5.

## **15. The European Convention on Human Rights**

The Governments signatory hereto, being Members of the Council of Europe have agreed as follows:

### **ARTICLE 1**

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

### **ARTICLE 2**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

### **ARTICLE 3**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

### **ARTICLE 4**

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.

For the purpose of this article the term forced or compulsory labour' shall not include:

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.



## ARTICLE 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (a) the lawful detention of a person after conviction by a competent court;
  - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
  - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

## ARTICLE 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and the facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

#### **ARTICLE 7**

- 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
- 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

#### **ARTICLE 8**

- 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### **ARTICLE 9**

- 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

## **ARTICLE 10**

1. Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

## **ARTICLE 11**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

## **ARTICLE 12**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

## **ARTICLE 13**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

## **ARTICLE 14**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

## **ARTICLE 15**

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

#### **ARTICLE 16**

Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

#### **ARTICLE 17**

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

#### **ARTICLE 18**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

## APPENDIX B: Case Analysis Guidance

Write a critical summary of the judgment in *Hedley Byrne v. Heller* [1963] UKHL 4, [1964] AC 465

Your analysis should include:

- A brief summary of the facts pertinent to the decision
- An explanation of the legal issues involved in the decision
- The judgment
- The ratio decidendi
- The obiter dicta
- A discussion of the significance, if any, of this case

The Case Analysis question is broken down into its component parts with some general comments about what an examiner would look for in the answer.

### A brief summary of the facts pertinent to the decision

The most important word in the sentence above is 'brief'. Writing a concise yet informative synopsis of a case is a vital skill to a lawyer in the Common Law system as s/he is constantly bombarded with detailed factual information coming from judgments, much of which is of no practical interest or use. The issue is not to consider how *many* words you need to get to the pith of a case, but rather how *few* words you can get away with.

In deciding what to include and what to exclude, you need to consider the point of the exercise. The first step might be to think of your target audience. If you were describing the facts of a law case to a film producer with a view to him or her making a movie out of it, you would probably want to include elaborate details about the 'characters' – their ages, gender, jobs, motivation etc. – as well as locations, times and precise information about each incident: you will often find such detail in the judgments, but it not might not be particularly relevant to a lawyer.

Some judges are notorious for dramatizing events, especially Lord Denning. In *Hinz v Berry*, he famously discussed the bluebells of Kent; in *Miller v. Jackson*, the joys of rural cricket; and in *George Mitchell v Finney Lock Seeds*, he quoted a charming poem from the celebrated children's book 'Alice Through the Looking Glass.'. Quirky and delightful as this all was, none of this persiflage was of any importance to the cases themselves, and therefore would be an obvious starting point for the edit, assuming that your target audience is not a film producer but rather another lawyer. What a lawyer usually wants to know is whether – in a snapshot – it is worthwhile reading the whole case, given his or her special area of interest.

Assuming that you are writing for a lawyer (possibly even for your own notes) having culled the obvious nonsense from the judgments, you then need to consider the purpose to which the synopsis is to be put. If you just want an *aide memoire* for yourself, to remind you which case is which, you might reduce *Hedley Byrne v. Heller* down to six words:

The first judicial acceptance of negligent misstatement.

However, this would not be very informative to anyone else. Think why another lawyer might care about this case. Lawyers are interested in legal principles, so ask what legal principle this case demonstrates, and then give just enough information about the facts to contextualise the application of that principle. Thus, in *Hinz v Berry*, where the principle relates to the measure of damages for nervous shock, it might be relevant to mention that Mrs. Hinz's family was run over by Berry in front of her eyes, but does it matter that he was driving a Jaguar; that the family were picnicking in a layby at the time; or that she was picking bluebells when it happened?

Similarly, in *Hedley Byrne v. Heller*, does it matter that the appellants were advertising agents or that the defendants were a merchant bank? Did this context affect the decision?

Of course, many cases demonstrate more than one principle, so you might need to decide on which ones you are focussing before writing your synopsis. The actual legal issue in *Hinz v Berry* was not about either *when* or *whether* you can get damages for nervous shock on seeing an accident to your family (although these issues were discussed) but rather *how much* you can get. On that basis, your synopsis might credibly not include any of the background facts at all!

A defendant contested the amount of an award of damages for causing nervous shock by negligence. The Court of Appeal held that although the High Court award was rather high, it could not be overturned as it was not unreasonable.

Enough information on the pertinent facts in under 40 words, with no mention of bluebells, picnics or even the car!

Note, however, that what you must always include in your synopsis is *what* was decided and – if possible – some indication of *why* (without going into the detailed *ratio decidendi*). If you miss this out, you have not explained the case at all: you have just told an unfinished story.

So, what about our case? How little can you get away with in your synopsis? Depending on your target audience, you could do it in 50 words:

The plaintiffs sought financial references on a prospective client from the defendant bankers, and lost money when the positive references turned out to be inaccurate and the client defaulted. The House of Lords held that the banker would have been liable for negligent misstatement but for an express exclusion clause.

If someone is just looking for cases about negligent misstatement relating to financial advice – and possibly the effect of exclusion clauses – that might well be enough information to alert them that this might be an important case. It does not make for much of an anecdote, but that is not its purpose.

However, it might be that you want to impress upon your audience that this was a case involving a restricted test for negligent misstatement based on the proximity or ‘special relationship’ of the parties; or that it involved a significant departure from the law as it was then understood; or that as the actual decision hinged on the exclusion clause, the judgment on the negligent misstatement was actually only an *obiter dicta*. If you have not mentioned these details, you may have omitted – to someone in the trade or sector – what might actually be the most significant features of the case. Thus, there can be a fine line between is really relevant and needs to be included, and what does not.

Here is an example of a more comprehensive case summary, but does it now contain extraneous details?

The plaintiffs, who were advertising agents, wished to know whether they could safely give credit to a company, Easipower. They therefore sought bankers’ references about Easipower. The plaintiffs’ bankers made enquiries of Easipower’s bankers (the defendants) who twice gave good references. These were passed onto the plaintiffs by their bankers, even though they were marked “Confidential. For your private use.” The references were also stated to be given “without responsibility on the part of this bank or its officials.” In reliance on these references, the plaintiffs incurred expenditure on behalf of Easipower, and when Easipower went into liquidation, they suffered substantial loss. They sought to recover the loss from the defendants on the basis that they had been negligent in giving the references.

Their claim was denied by both the High Court and the Court of Appeal on the basis that the defendants owed no duty of care to the plaintiffs since it would not be reasonable to impose upon a banker an obligation to exercise care when informing a third party of the creditworthiness of his client. The House of Lords affirmed the decision in favour of the defendant, but **not** on the grounds that there could never be liability for negligent misstatement.

Indeed, all the judges held that a duty of care in making statements was a possibility, and the majority held that the plaintiffs would have succeeded in their claim but for the defendant's exclusion of responsibility clause.

However, it was clear that something more than *Donoghue v. Stevenson* 'foreseeability of harm' was needed to create such a duty of care, especially because there could be many people affected by a single misstatement. There had also to be a 'special relationship' between the plaintiff and the defendant, based on an express or implied assumption of responsibility by the defendant, usually evidenced by the defendant giving advice when s/he knew or ought to have known that it would be reasonably relied on by the other party without making further enquiries.

You will have begun to see some of the problems in composing a case synopsis and why it is an important skill. If it is written to serve every possible need, it will probably end up serving no needs at all: lawyers will find it to be too descriptive; trades-people will say it is too legalistic; and lay-people may simply not understand it. And it probably will not be very brief!

### **An explanation of the legal issues involved in the decision**

Here you are looking to find the specific legal issue (or issues) which was central to the case: what was the court actually being paid to decide? The problem with this can be that in some cases (including this one) the court may appear to be more interested in some aspect of the law it was not actually asked about. This will lead to some interesting obiter dicta, but we will deal with that later.

Going back to *Hinz v Berry*, it might be thought that the judges 'decided' that you can only claim for 'nervous shock' if you have suffered a recognised psychiatric illness, rather than just grief or distress. Well, they did say that, but that was NOT what they 'decided'. Why not? Because that is not what they were asked to decide. The defendant in *Hinz v Berry* did not contest liability, so it was not necessary for the court to decide whether his causing the claimant nervous shock amounted to a tort or not. All he was contesting was the amount awarded. The Court of Appeal 'decided' that they could not overturn the award of the lower court, so it is that which needs to be the subject of the query – what is the reason for that decision? And the reason – or '*ratio*' – needs to be a statement of legal principle.

In *Hinz v Berry*, the relevant legal principle on which the case was decided was that an appeal court can only overturn a decision based on objective reasonableness if the lower court's assessment was wholly unreasonable: nothing to do with nervous shock at all, and potentially of far wider application than in the particular facts of the case itself.

So, what about our case?

What was the court *asked* to decide? What were the legal points in issue?

You might note that as this was a case on appeal, there were no issues of *fact* to decide. Appeal cases are nearly always about points of pure law rather than about issues of fact. The facts have already been 'decided' by the court of first instance, based on the evidence, so the higher courts will not question them or call witnesses to verify them. The only issue for the appeal courts is – given the decided facts, was the law correctly stated and/or applied by the lower courts?

In this case, the legal questions for the court were:

- (i) Can the tort of negligence cover misstatements, even where the loss suffered by the plaintiff (claimant) is purely financial? And, if so, in what circumstances and with what restrictions (if any)?
- (ii) What is the effect of an exclusion clause on liability in such cases?

Now you have identified the questions, you can look for the answers and for the precise reasons for those answers – that is to say, the legal principles that were applied to get to the result.

## The judgment

In order to discover the reason why a case was decided the way it was, you must first understand what it was that was actually 'decided' as opposed to matters that were simply discussed in passing. (See *obiter dicta* below.)

One curiosity about *Hedley Byrne v. Heller* is that although the main issue for the court related to negligent misstatement and the potential liability of financial advisors, the case was actually decided on the effect of the exclusion clause. The judgment may therefore be stated thus:

The House of Lords held that even if the defendants could have had owed the plaintiffs a duty of care not to give financial advice negligently, this was limited to situations where there was a pre-existing special relationship between the parties, such that the defendants had assumed responsibility for their statements. As any such assumption of responsibility had been vitiated by the exclusion notice, no such liability could arise on the facts of the case, and the defendants were not liable.

## The ratio decidendi

Once you know what the judgment was, you can look for the legal principle behind it.

There are some cases where the *ratio* can be very obscure and/or controversial, but the key issue in any case is to know what it is you are looking for. *Ratio decidendi* means 'the reason for deciding', and in order to discover the reason why a case was decided the way it was, you must first understand what it was that was actually 'decided' as opposed to matters that were simply discussed in passing. (See *obiter dicta* below.)

One curiosity about *Hedley Byrne v. Heller* is that although the main issue for the court related to negligent misstatement and the potential liability of financial advisors, the case was actually decided on the effect of the exclusion clause. Lord Morris, for example, having discussed *obiter* the rules of negligent misstatement in some detail, doubted whether they would apply to the facts of the instant case, but concluded thus:

Lord Morris

*I need not, however, seek to deal further with this aspect of the matter, which perhaps cannot be covered by any statement of general application, because, in my judgment, the bank in the present case, by the words which they employed, effectively disclaimed any assumption of a duty of care. They stated that they only responded to the inquiry on the basis that their reply was without responsibility. If the inquirers chose to receive and act upon the reply, they cannot disregard the definite terms upon which it was given. They cannot accept a reply given with a stipulation and then reject the stipulation. Furthermore, within accepted principles (as illustrated in *Rutter v. Palmer*) the words employed were apt to exclude any liability for negligence.*

Similarly, Lord Devlin concluded:

"A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it, he declares that in fact he is not. The problem of reconciling words of exemption with the existence of a duty arises only when a party is claiming exemption from a responsibility which he has already undertaken or which he is contracting to undertake."

It might thus be said that the *ratio decidendi* of this case relates solely to the exclusion clause, and is that, as a matter of law, a disclaimer of liability clause outside the context of a contract will be effective to release someone from liability for any matters that are effectively covered by it. Of course, there is much more to the case than that, and we especially need to consider the *obiter dicta*.



## The obiter dicta

*Obiter dicta* are principles stated by judges which are not needed – or necessarily even relevant – to reaching the decision in the case at hand, but which the judges think will provide guidance in later cases. Although they do not form part of any binding precedent, they can be extremely influential. In *Hinz v Berry*, for example, the *obiter* statements about the fact that a claim for pure nervous shock must involve a genuine psychiatric illness have made this case definitive on that point of law, even though the question was not raised at all by the parties.

That said, it can sometimes be difficult to work out the difference between *obiter* and *ratio*, and it may well be that the judge – focussed just on the case at hand – makes no *obiter* statements at all. On the other hand, the *obiter dicta* can, in practice, be far more important than the *ratio decidendi*, even though they are technically not binding. Such is the case here. As indicated earlier, the defendants were held not to be liable because – whether or not they had a duty of care towards the plaintiffs – they had effectively excluded their liability with their disclaimer. The House of Lords' views on the possible duty owed were therefore all technically *obiter dicta* – but they have been adopted and adapted in later cases as if they were part of the *ratio*.

The criteria for when a duty of care will arise are discussed in detail throughout the case, and are neatly summarised by both Lord Reid and Lord Morris.

Lord Reid

*I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the enquirer was relying on him. I say "ought to have known" because in questions of negligence we now apply the objective standard of what the reasonable man would have done.*

Lord Morris

*I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.*

## A discussion of the significance, if any, of this case

This case was hugely significant in its day for various reasons.

In the first place it was an early indication of the importance that public policy considerations would play in the development of duty of care, right up until Lord Reed's recent curb on this in *Robinson v. Chief Constable of West Yorkshire* [2018] AC 736.

By 'policy considerations' we mean those matters of general public policy which guide and constrain the courts in the way they make their decisions. This is especially pertinent to issues of Duty of Care in the tort of negligence. The whole of the doctrine of negligence is grounded in public and commercial policy, so it was an unavoidable aspect of any decision in this area. It was not only considered often to be too harsh on a defendant to make him liable for the far reaching consequences of a breach, but it was also (perhaps more importantly) considered to be unworkable both in practical terms of court resources, and as a matter of commerce, as such potential liability would seriously affect the willingness and ability of business people to trade in certain sectors.

For example, certain types of action became barred not because there was no culprit or victim, but simply because to allow one claim would be to allow millions, and the system could not cope. An example is the continued difficulty in suing for pure psychiatric illness caused by seeing a shocking event, as many people might see such an event and there could therefore be a multitude of claims. The courts have therefore devised 'control mechanisms' to limit claims, which have nothing to do with culpability or individual justice, and everything to do with public policy.

It is also extremely difficult to sue the police and other emergency services in negligence for their omissions, because as a matter of public policy we would rather have them investigating crime (or putting out fires etc.) than defending themselves in court! Similarly, certain actions will not be available in contract if they would cause massive disruption to accepted trade practice, even though the claimant in an individual case may appear to have a valid and reasonable claim.

Another example – as with *Hedley Byrne v. Heller* – is the restriction on allowing claims for negligent misstatement, even though the claimant appears to have a good case on an individual basis. The reason why such claims were not permitted at all prior to this case was entirely policy driven, especially because of what is known as the potential 'ripple effect', whereby a piece of bad advice could easily be relied on by a succession of people, causing massive potential litigation, which would be disproportionate to the negligent act and also be unmanageable by the court system.

It was clearly felt by the time of *Hedley Byrne v. Heller* that this blanket prohibition on such claims was unreasonable to some claimants and unnecessary for the public good, but that such claims still needed to be limited. Thus, the judges in *Hedley Byrne v. Heller*, whilst permitting such claims in general, also tried to restrict them with the policy devices of the 'assumption of responsibility' and the 'special relationship'.

So, what of the future? Would this case change the way people in the financial sector behaved? Would it make them more circumspect about what advice they were willing to give, and in what circumstances?

From the lawyers' point of view, did this case teach us anything new, or was it just the application of established rules to a set of unique facts?

In fact, we do not need to guess the future of *Hedley Byrne v. Heller*, as it has already come. There have been numerous decisions where the case has been applied which have no factual connection to it at all; and others, with apparently very similar facts, where it has been distinguished.

In what is now the leading case on negligent misstatement, the House of Lords specifically referenced *Hedley Byrne v. Heller* in reformulating the rules, showing its enduring role in this area of law.

***Caparo Industries plc v. Dickman* [1990] 2 AC 605 (HL) (Lord Oliver)**

*What can be deduced from the Hedley Byrne case...is that the necessary relationship between the maker of a statement or giver of advice (the adviser) and the recipient who acts in reliance in it (the advisee) may typically be held to exist where:-*

*(1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given;*

*(2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertained class, in order that it should be used by the advisee for that purpose;*

*(3) it is known, either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry; and*

*(4) it is so acted upon by the advisee to his detriment.*

When considering the impact of a particular case, it is always worth checking to see if it has been referenced in any later cases. This will show you if it has been influential, though it might only have been mentioned in passing – or even distinguished or disapproved. You can do this simply by searching for the case in Westlaw, and then looking for ‘Cases citing’ in the Case Analysis. When you look up *Hedley Byrne v. Heller*, you will find that there are dozens of cases on the list!

## APPENDIX C: TEST YOUR KNOWLEDGE

1. Which of these is the odd one out?
  - A Inner Temple
  - B Outer Temple
  - C Middle Temple
  - D Lincoln's Inn
2. Who is the current Master of the Rolls?
  - A Terence Etherton
  - B Brian Leveson
  - C Ian Burnett
  - D John Thomas
3. Who is the current President of the Supreme Court?
  - A Thompson Denning
  - B Robert Reed
  - C Brenda Hale
  - D Jill Black
4. Which of these is the head of the Court of Appeal (Civil Division)?
  - A The Master of the Rolls
  - B The President
  - C The Lord Chief Justice
  - D The Vice Chancellor
5. Which of these is the head of the High Court (Family Division)?
  - A The Master of the Rolls
  - B The President
  - C The Vice Chancellor
  - D The Chancellor of the High Court
6. Who is set to be the next Head of State of the UK?
  - A Keir Starmer
  - B Boris Johnson
  - C Charles Windsor
  - D Harry Wales
7. What do the letters JSC mean when placed after someone's name?
  - A Justice of the Supreme Court
  - B Joint Stock Company
  - C *Justice Sans Compromis*
  - D Judge of the Sessional Court

8. Which of these statements is true?
- A There are far more solicitors than barristers
  - B There are far more barristers than solicitors
  - C There are about equal numbers of barristers and solicitors
  - D Solicitor is just another name for barrister
9. What is the modern term for stipendiary magistrates?
- A Fee-paid judges
  - B District judges
  - C Puisne judges
  - D Circuit judges
10. Which is the highest form of domestic law?
- A Decisions of the Supreme Court
  - B Acts of Parliament
  - C Decisions of the Privy Council
  - D Bye-laws
11. What is the most common form of delegated legislation?
- A Bye-laws
  - B Acts of Parliament
  - C Statutory Instruments
  - D Judicial Decisions
12. Which of these is a rule of statutory interpretation?
- A *veni, vidi, vici*
  - B *volenti non fit injuria*
  - C *ejusdem generis*
  - D *draco dormiens nunquam titillandus*
13. When was the system of assizes abolished?
- A 1865
  - B 1914
  - C 1971
  - D Never
14. What do square brackets round a date mean in a case citation?
- A You need to know the date to find the case
  - B You do not need to know the date to find the case
  - C The date may not be correct
  - D The brackets have no significance at all
15. In a criminal case reported as *R. v. Barrie* in 1965, what does the R stand for?
- A Rex
  - B Regina
  - C Royalty
  - D Registrar

16. In a civil case called *Barrie v. Mike*, how should the letter 'v' be pronounced?
- A Versus
  - B Against
  - C And
  - D Vee
17. If a case is reported in all the following law reports, which one should you use in court?
- A The All England Law Reports
  - B The Solicitors Journal
  - C The Weekly Law Reports
  - D The Law Reports
18. In a case in the Court of Appeal (Civil Division) in 2020, Barrie is the appellant. What was he most likely to have been in the case at first instance?
- A The claimant
  - B The petitioner
  - C The defendant
  - D There is not enough information to tell
19. In a case in the Crown Court in 2020, Barrie is the appellant. What was he most likely to have been in the case at first instance?
- A The claimant
  - B The plaintiff
  - C The defendant
  - D There is not enough information to tell
20. What does it mean to say that a case is 'distinguished'?
- A It is a very important case which must always be followed
  - B The principle of the case is accepted in a later case but found not to apply
  - C The *ratio* of the case is too uncertain to be applied in a later case
  - D The decision is considered to be incorrect as a matter of law
21. What does the expression *cur adv vult* mean?
- A The court will give its judgment on another day
  - B The claimant in a civil hearing has no prospect of winning the case
  - C The judge in a criminal trial instructs the jury to acquit the defendant
  - D The decision given is one of the entire court
22. In which case was it held that equitable principles should prevail over legal principles?
- A The Earl of Cambridge's Case
  - B The Earl of Oxford's Case
  - C The Earl of Sussex's Case
  - D There is no such principle

23. In which case was it held that judges may, if appropriate, consider parliamentary materials when interpreting statutes?
- A *Pepper v. Hart*
  - B *Fisher v. Bell*
  - C *Young v. Bristol Aeroplane Co.*
  - D There is no such principle
24. What is the maximum age at which you can serve on a jury?
- A 65
  - B 70
  - C 75
  - D 80
25. Which of the following is *not* a litigation track in the County Court?
- A The small claims track
  - B The fast track
  - C The slow track
  - D The multi-track
26. Which of the following is *not* a division of the High Court?
- A The Queen's Bench Division
  - B The Family Division
  - C The Chancery Division
  - D The Criminal Division
27. What is meant by 'hearsay'?
- A Denying the primacy of the established state religion
  - B Repeating what someone has told you about an incident
  - C Listening to someone without interrupting them
  - D Spoken defamation
28. To which court would one take an appeal by way of case stated from the magistrates' court?
- A The Court of Appeal (Civil Division)
  - B The Court of Appeal (Criminal Division)
  - C The Divisional Court of the Queen's Bench Division
  - D The Divisional Court of the Chancery Division
29. Who is the current Lord Chief Justice?
- A Terence Etherton
  - B Brian Leveson
  - C Ian Burnett
  - D John Thomas

30. What is the usual meaning of the 'golden rule' of statutory interpretation?
- A A court should give words in a statute their literal meaning
  - B If the words of a statute are ambiguous, the court should give them their most likely meaning
  - C If some of the words in a statute do not seem to make sense, the statute has no effect
  - D A court should assume that Parliament did not intend to alter the existing common law
31. Which part of a Law Report could be a 'primary source' of law?
- A The judgments
  - B The headnote
  - C The arguments of counsel
  - D All of the above
32. What does SC (E) mean?
- A Supreme Court (Entirely)
  - B Supreme Court (England)
  - C Supreme Court (Easter Session)
  - D Special Court (Excluded)
33. What is the standard of proof usually required of the prosecution in a criminal case?
- A Beyond all reasonable doubt
  - B On the balance of probabilities
  - C More likely than not
  - D None of the above
34. How would you normally address a male magistrate in court?
- A Your Honour
  - B Your Worship
  - C Your Lordship
  - D Sir
35. How would you normally address a female circuit judge in court?
- A Your Honour
  - B Your Worship
  - C Your Grace
  - D Your Ladyship
36. Proceedings for which of the following criminal trials would NOT begin in a magistrates' court?
- A A summary offence
  - B A hybrid offence
  - C An indictable offence
  - D All criminal proceedings begin in the magistrates' court



37. What is the maximum fine a magistrate may impose?

- A £2,000
- B £3,000
- C £4,000
- D £5,000

38. Which of these sentences is correct?

- A The Court of Appeal (Civil Division) cannot overrule it's own judgements.
- B The Court of Appeal (Civil Division) cannot overrule its own judgements.
- C The Court of Appeal (Civil Division) cannot overrule its own judgments.
- D The Court of Appeal (Civil Division) can overrule its own judgments.

39. What is the maximum number of judges who can sit on a case in the Supreme Court?

- A 5
- B 7
- C 9
- D 11

40. Which of these is the odd one out?

- A. Chancellor of the High Court
- B. Lord Chancellor
- C. Chancellor of the Exchequer
- D. Chancellor of the Duchy of Lancaster

41. What does it mean to say that a decision has been over-ruled?

- A The only copy of the decision has been obscured
- B A later court has made an inconsistent decision which cancels it out
- C The decision is not applicable to a particular later case
- D The decision is applicable to a particular later case

42. To which court would an appeal by the accused from the magistrates normally go?

- A Crown Court
- B High Court
- C Court of Appeal
- D None of the above

43. What does the expression *per curiam* mean?

- A The legal matter has been resolved
- B The claimant's case has been proved without need of evidence
- C The decision in a previous case is considered to have been wrongly decided
- D The decision given is one of the entire court

44. What term describes a legal system which is based on the doctrine of *stare decisis*?

- A Common Law
- B Civil Law
- C Canon Law
- D Martial Law

45. In a criminal case reported as *R. v. Barrie*, how should the letter 'v' be pronounced?
- A Versus
  - B Against
  - C And
  - D Vee
46. Which of these is a valid neutral citation?
- A [2020] UKSC 1
  - B [2020] EWBC 1
  - C [2020] EWHL 1
  - D [2020] UKCA (Civ) 1
47. The decisions of which courts would you *normally* find in the Law Reports, Appeal Cases?
- A The Supreme Court
  - B The Court of Appeal, Civil Division
  - C The Court of Appeal, Criminal Division
  - D All of the above
48. Which courts are *not* bound by the decisions of the Supreme Court?
- A The Supreme Court
  - B The Divisional Court
  - C The Court of Appeal (Criminal Division)
  - D All the courts mentioned are bound the decisions of the Supreme Court
49. What form of referencing is normally used in English legal writing?
- A OSCOLA
  - B Harvard
  - C Cambridge
  - D Chicago
50. What was for sale in the case of *Partridge v. Crittenden*?
- A Bramblefinch hens
  - B A partridge in a pear tree
  - C Two turtle doves
  - D Four calling birds